Agenda

Advisory Committee on Rules of Civil Procedure

August 27, 2003
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes	Fran Wikstrom
New trial judge after remand	Rich Humpherys
Comments to rule amendments	Tim Shea
Rule 68. Offer of judgment	Tim Shea
Electronic filing rules	Tim Shea

Meeting Schedule

September 24
October 22
November 19 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 28, 2003
Administrative Office of the Courts
Francis M. Wikstrom, Presiding

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

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Debora Threedy, James T. Blanch

GUESTS: Rep. John Dougall, Steven Densley, Brian King

I. WELCOME AND APPROVAL OF MINUTES.

Francis M. Wikstrom called the meeting to order at 4:00 p.m. The Minutes of the April 23, 2003 meeting were reviewed. Terry T. McIntosh pointed out an error on page 6, where the last part of the parenthetical at the end of the first paragraph of Part IV (Service by Mail) should read "corporate defendant's mail room," and not "law firm's mail room." It was moved and seconded that the Minutes be approved with this amendment. The motion passed unanimously.

II. RULE 68. OFFER OF JUDGMENT.

Mr. Wikstrom introduced Rep. John Dougall and Steven Densley. After meeting with the Rule 68 subcommittee,[1] Rep. Dougall and Mr. Densley have agreed to meet with the full Committee to provide background on proposed amendment to Rule 68.

[1]At the Committee's April 23, 2003 meeting, Judge Lyle Anderson, Leslie Slaugh, and Francis Carney ("subcommittee") agreed to contact Rep. John Dougall to inform him of the issues being discussed by the Committee with regard to a proposed amendment to Rule 68.

Before discussion, Francis Carney commented that the subcommittee had met and that a revised version of proposed Rule 68 has been drafted by Mr. Slaugh and Mr. Densley. Leslie Slaugh also pointed out that the new version of the amendment to Rule 68 eliminates the portion requiring "making a deposit into court."

By way of introduction, Mr. Densley stated that he first contacted Rep. Dougall about amending Rule 68 as an attempt to provide by Rule for a way to cut off attorneys' fees at some point in a litigation. Mr. Densley litigates contract cases where the contracts typically contain a provision requiring the losing party to pay the prevailing party's attorneys' fees. He commented that these cases are usually difficult to settle because of this provision, since each party assumes it will prevail and because there is no satisfactory way to limit attorneys' fees. After contacting Rep. Dougall to propose an amendment, Mr. Densley prepared a proposed preliminary draft of an amended Rule 68. The purpose of Mr. Densley's proposed amendment was to cut off the continuing obligation to pay attorneys' fees if a reasonable offer of judgment is made. Mr. Densley's proposed amendment would have limited this to a situation where a contract or a statute would allow an award of attorneys' fees to the prevailing party. However, the Office of Legislative Research and General Counsel revised Mr. Densley's version and, according to Mr. Densley, in doing so went farther than he had proposed. When the proposed amendment to Rule 68 was later raised on the House floor, it was opposed by Rep. Scott Daniels, who stated that it should be handled by this Committee.

In response to Thomas Lee's question of whether the proposed amendment would allow all defendants to recover attorneys' fees, Mr. Densley stated that it would. Mr. Lee then expressed two concerns: (1) he does not believe that Rule 68 as written does this, and (2) he believes Rep. Daniels may not be correct about the proper place for the amendment to originate, since the proposed revision would impact statutes. Mr. Lee opined that he believes the proposed rule would amend the attorneys' fees statute, and he does not believe the Committee has authority to do that. Thomas Karrenberg agreed with Mr. Lee, commenting that the proposed changes would re-write contracts and statutes, which is not within the Committee's authority.

The Committee then discussed the wording of the proposed changes, and whether the Committee has authority to make such changes. Mr. Karrenberg stated that the definition of "prevailing party" is unclear. Mr. Wikstrom commented that he likes the concept of the potential for cutting off attorneys' fees at some point, but that the meaning of "reasonable" is not clear. In response to Mr. Wikstrom's comment, Mr. Slaugh stated that the proposed Rule attempts to provide that a party will not receive attorneys' fees if it rejects a reasonable offer, *i.e.*, the proposed Rule creates a presumption that an award of attorneys' fees is unreasonable after the party rejects a reasonable offer. The Committee discussed ways to amend Rule 68, as well as the meanings of "reasonable" and "prevailing" party. After several members suggested that a plaintiff should not be considered a "prevailing party," there was a comment that the Bar would prefer that the Rule apply to all parties.

Several Committee members commented that this Committee is the place to propose an amendment, since the Legislature has already made that decision. Glenn Hanni then asked how

the Legislature handled the Rule 68 question and, after Rep. Dougall's explanation, Mr. Hanni commented that it appears that the Legislature invited the Committee to deal with Rule 68.

A motion was made to delete the second part of paragraph (a) of proposed Rule 68. The motion was seconded and approved unanimously, with Mr. Carney expressing reservations. Mr. Slaugh moved that the proposed Rule apply only to a "party defending against a claim." The motion was seconded and approved unanimously. The Committee then discussed the term "reasonable and necessary," and agreed that "necessary" was not needed.

Mr. Lee asked the meaning of "bad faith of the offeror." Mr. Slaugh explained that this allowed a trial court discretion in determining whether to apply the rule. Mr. Slaugh commented that this could apply in numerous situations, such as where the offeror failed to inform the offeree of everything where, if the offeror had done so, the offeree would have accepted the offer. Brian King explained this concept in more detail. After Mr. King's explanation, Mr. Wikstrom suggested that this language be changed to "The court may suspend the operation of this rule to prevent manifest injustice." The Committee agreed with Mr. Wikstrom's suggestion.

The Committee also discussed the term "adjusted award," and it was agreed that Mr. Slaugh, Mr. Carney, and Judge Lyle Anderson would examine this language, and would also consider whether a provision for shifting costs should continue to be included in the Rule.

Mr. Wikstrom thanked Rep. Dougall, Mr. Densley, and Mr. King for their input, and asked the subcommittee to continue to work on the proposed amendment with today's discussion in mind.

III. SMALL CLAIMS RULES.

Tim Shea introduced the suggested amendments to the small claims rules, and directed the Committee's attention specifically to Rule 4 (counteraffidavit). Mr. Shea asked how this would proceed if a matter was moved to district court, since there is no discovery and there are relaxed rules of evidence in small claims court, and the counteraffidavit might fail to meet Rule 12 standards. After discussing Rule 4, Mr. Wikstrom moved to approve it as amended. The motion was seconded and approved, with only David Scofield voting against approval.

Mr. Slaugh moved that the wording of Rule 11, line 27 ("the judgment satisfied") be changed to "The court may enter a satisfaction of judgment." All members voted in favor of this change.

Mr. Lee expressed concern that Rule 1 of the proposed small claims rules is even more stringent than Utah R.Civ.P. 11. Suggestions were made for modifying the language of proposed subpart (d) of Rule 1. It was agreed that the language regarding "legal and factual contentions" being brought in "good faith" should be modified.

The Committee discussed Rule 12 and the justice court. Mr. Slaugh expressed concern that justice courts might believe they can simply affirm a small claims ruling, and he commented that this is not an appeal. He suggested that subpart (g) be deleted to solve this. Judge Anderson spoke in favor of retaining subpart (g). A majority of members agreed that it should be retained.

Judge Anthony Schofield then commented that subpart (h) of Rule 12 should remain in the Rule, and Paula Carr addressed the issue of why justice court judges would want to know what occurs in the district court. Mr. Shea suggested that the term "new trial" be used in place of "trial *de novo*." A majority of the members agreed with Mr. Shea's suggestion, with only Judge Schofield and Mr. Hanni in favor of retaining the term "trial *de novo*."

Judge Schofield moved to approve the small claims rules as presented today, with the changes discussed. The motion was seconded, and unanimously approved.

IV. RULE 26. (DELETE DISCLOSURE AND DISCOVERY PLAN EXEMPTION FOR SELF-REPRESENTED LITIGANTS).

Mr. Shea referred the Committee to the letter from Chuck Eddy, which asks that the Committee consider amending Rule 26 to delete the provision which exempts *pro se* litigants from certain discovery and disclosure requirements imposed on represented parties. After discussion, the Committee agreed not to consider an amendment such as Mr. Eddy suggests.

V. RULE 4(d). (PUBLICATION OR ORDER TO SERVE BY PUBLICATION.

Mr. Carney addressed the "alternative service" provision in Rule 4. He stated that certain language[2] is not being enforced, and asked whether that language should be retained. R. Scott Waterfall moved that this language be deleted from Rule 4, but there was no second. After comments by Judge Schofield, Judge Anderson, Mr. Karrenberg, and Mr. Waterfall, Mr. Wikstrom suggested a modification of the present language. Mr. Waterfall then modified his motion to conform to Mr. Wikstrom's suggestion that the language be changed to "Except for service by publication, a copy of the court's order shall be served with the complaint." The motion was seconded, and approved unanimously.

VI. RULES 54, 62. (ENFORCEABILITY OF ORDERS).

Mr. Wikstrom referred the Committee to an article in the May 2003 Utah Bar Journal by Kent O. Roche, titled "The Final Judgment Rule: Appealability and Enforceability Go Hand in Hand." Mr. Roche's article deals with amending Rule 54.

[2]The referenced language is "A copy of the court's order shall be served upon the defendant with the process specified by the court." *See* Utah R.Civ.P. 4(d)(4)(A) .

Judge Schofield commented that he believes Mr. Roche's article raises a legitimate issue. Cullen Battle stated that he believes the Rule should be left as is, and that "final judgment" should be defined as "one from which an appeal lies." After discussion, Mr. Wikstrom moved to amend Rule 62 to add "final" to precede the word "judgment." The motion was seconded, and approved unanimously.

VII. NEW TRIAL COURT JUDGE AFTER REMAND.

The Committee returned to the issue raised in previous meetings: whether, in cases involving a reversal on appeal, the Rules should be amended to allow a party to request a new trial court judge simply by requesting it. Mr. Shea referred to a chart which purportedly reflects opinions on this issue by attorneys, and commented that the Committee should make its decision based on whether or not the policy is sound, not on the opinions reflected in the chart. Judge Anthony Quinn asked whether anyone's mind was changed after reviewing the chart, and two members indicated that their opinions were changed.

Mr. Slaugh commented that after reviewing e-mails, his concern is that there presently is no mechanism other than an affidavit which would let a trial court judge know that a party would like the judge to recuse. Mr. Lee stated that he agreed with Mr. Slaugh, and that he believes the rules should include some provision stating that a judge should consider whether he or she should recuse. Judge Schofield suggested that the rule might include a provision stating that the parties may include in appellate briefs a request for a new trial court judge.

Mr. Hanni asked why there is so much resistance to a mandatory reassignment. He commented that lawyers may not care about having a new judge, but that clients do care, and that the "appearance of justice" is very important. Judge Anderson responded to this, noting that he believes mandatory reassignment would upset the system.

After further discussion, it was agreed that this issue will be placed on the agenda for the September 2003 meeting, and that any decision will be deferred until at least that time.

VIII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The Committee's next meeting will be held at 4:00 p.m. on Wednesday, August 27, 2003, at the Administrative Office of the Courts.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: August 19, 2003
Re: Comments to rules

We received two comments on Rule 7 and several on Rule 73. Regarding the latter, the commentators either say the new fee schedule is adequate or too low. Some commentators support the new augmentation provision. Others recommend defining either "routine post-judgment procedures" or "considerable additional efforts." Two suggest that post-judgment procedures should not be included in the schedule. Two suggest that the rule recognize contingency fee contracts as a means of determining attorney fees. These and the remaining comments are summarized below and attached. The rule amendments also are attached.

Rule 7.

Bob Wilde: Non-moving party should have 30 days to respond to a motion for summary judgment. Reply memo should be due 15 days after that.

Johnnie Johnson: Require party preparing order to give notice that proposed order is only a proposal. Provide time frame for filing objection.

Rule 73.

Chad McKay: Supports raising the base amount. Expand the schedule up to $10,000 judgments at $75 fee increments.

Paul Simmons: Clarify whether schedule is available in contested cases or only in default cases. Clarify whether schedule can be used in judgments over $5,000. Clarify whether schedule applies when attorney fees are awarded as part of damages. Clarify whether schedule applies when attorney fees are awarded in minor's cases. Clarify whether court can consider contingency fee contract in determining attorney fee. Clarify that rule does not affect the attorney fee contract.

Judy Jorgensen: Supports the new schedule and the new augmentation provision.

Stephen Elggen: Supports the new schedule and the new augmentation provision.

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Jonathan Jensen: Fees too low. Define "routine post judgment procedures."

Jonathan Thomas: Fees to low. Define "considerable additional efforts." Clarify that rule does not set a standard for reasonableness in non-schedule cases.

Judy Dawn Barking: Supports the new schedule and the new augmentation provision.

Neil Harris: Supports new schedule. Define "considerable additional efforts."

Mark Olson: Supports the new schedule and the new augmentation provision. Puts attorneys on notice that if they expect significant post-judgment work, they should proceed by affidavit.

Doug Short: Recognize contingency fee contract as a means of determining reasonable attorney fee. Fees too low. Fees should not include post judgment procedures.

Peter Waldo: Fees too low. Fees should not include post-judgment procedures.

Brian Steffensen: Schedule is poor policy. Fees too low.

Rule 68. Offer of judgment.

(a) Unless otherwise specified, an offer made more than 10 days before trial by a party defending against a claim to allow judgment to be entered in accordance with the offer is an offer to resolve all claims between the parties to the date of the offer, including damages, equitable relief, costs, interest and, if attorney fees are permitted by law or contract, attorney fees. If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer and the offeree shall pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(b) An offer to allow judgment to be entered in accordance with the offer shall be made in writing, shall remain open for at least 10 days and shall be served on the offeree under Rule 5. Acceptance of the offer shall be in writing and served on the offeror under Rule 5. Upon acceptance, either party may file the offer and acceptance with a proposed judgment under Rule 58A.

(c) "Adjusted award" means the amount awarded by the finder of fact and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are contingent upon payment of damages, the court shall pro rate the total reasonable attorney fees on a daily basis from the date the offeree retained counsel.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: August 19, 2003
Re: Electronic filing rules

The courts continue to make progress on electronic filing, focusing on collection cases from a several large-volume filers. The experience has shown us the need for several rule changes, and I request the committee appoint a subcommittee to help develop these. The following is a brief outline of the topics raised so far and the rules they affect.

Rule 1. In general.

1) Any reference to a writing, recording or image includes the electronic version thereof.

2) Not all courts are capable of electronic filing for all documents in all cases. The judge presiding over a case may require electronic filing. The judge presiding over a case should ensure for electronic procedures at least the same level of protection of rights as exists for paper procedures.

Rule 4. Service for personal jurisdiction.

1) Electronic service for personal jurisdiction not permitted.

2) If a complaint has been digitally signed and electronically filed, the copy of the complaint served on the defendant shall contain or be served with a statement:

a) that this is a true copy of the original complaint, which has been digitally signed and electronically filed, and

b) of the information required of the subscriber's certificate under Utah Code Section 46-3-103.

Rule 5.

1) Service after jurisdiction. Attorneys who subscribe to the electronic filing agreement with the courts will accept electronic service of documents. Other attorneys and parties may register with the court to enable electronic service. The judge presiding over a case may require the parties to accept electronic service. The judge presiding over a case should ensure that notice provided by electronic means in a particular circumstance is adequate.

2) Unless electronically served, if a document other than the complaint has been digitally signed and electronically filed, the copy of the document served on others, including parties and non-parties, shall contain or be served with a statement:

a) that this is a true copy of the original document, which has been digitally signed and electronically filed, and

b) of the information required of the subscriber's certificate under Utah Code Section 46-3-103.2)

3) Filing. A person may file with the court using any means of delivery permitted by the court, including physical delivery, courier, mail, fax or electronic delivery.

4) Electronic filing times: Determinative issue: What can our IT support?

Option 1. (Preferred, but perhaps not possible.) Accepted at any time. Recorded as filed as of the date and time of receipt.

Option 2. Accepted at any time. If after 5:00 p.m., recorded as filed as of the next business day.

5) Original/Copies. The electronic filing of a document with a digital signature is the original. An electronic record (scanned image) of a writing, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

6) Format. The graphic representation of an electronic document shall conform to the format requirements for paper documents.

Rule 10. Signature.

A person may sign a document using any form of signature recognized by law as binding. A digital signature is not the equivalent of a notarized, verified or an acknowledged signature, but if the URCP requires a notarized, verified or an acknowledged signature, a digital signature satisfies that requirement.

Digital and electronic signatures are recognized by statute. A digital signature has at least as much assurance of identity as a notarized signature. The author does not, by a digital signature, swear to the truth of the statement being signed, and so cannot be prosecuted for felony perjury. But a digital signature is sufficient for misdemeanor sanctions and sanctions under URCP 11.