MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 26, 2003
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Janet H. Smith, Francis J. Carney, R. Scott Waterfall, Terrie T. McIntosh, Glenn C. Hanni, W. Cullen Battle, Leslie W. Slaugh, Thomas R. Lee, Todd M. Shaughnessy, Virginia S. Smith, James T. Blanch

STAFF: Tim Shea, Judith Wolferts

EXCUSED: David W. Scofield, Thomas R. Karrenberg, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Honorable Lyle R. Anderson, Paula Carr, Debora Threedy

GUESTS: Matty Branch, Mark Olsen, Richard Deloney

I. WELCOME AND APPROVAL OF MINUTES.

Francis M. Wikstrom called the meeting to order at 4:00 p.m. Tim Shea stated that due to the press of matters at today's meeting, Doug Mortensen has agreed to delay his appearance before the Committee until the next meeting. Mr. Mortensen had been invited to attend today's meeting to discuss his proposal for a rule on reassignment of a case after remand.

The minutes of the February 26, 2003 meeting were reviewed. Tim Shea asked whether anyone recalled the details of the discussion referenced in Section III. It was agreed that the official set of minutes will exclude Section III, and that the issue presented in that Section will be discussed at this meeting. Glenn C. Hanni moved that the minutes be approved with this change. The motion was seconded and the February 26, 2003 minutes were approved as amended.

II. NOTICE TO DEFENDANT OF SIGNATURE REQUIREMENT.

Mr. Shea referred the Committee to pages 45-46 of the Agenda, and stated that a court clerk in the Third District informed him that default judgments are being entered against defendants who have filed an unsigned answer. The clerk suggested amending URCP 4(c) to require that the summons include a notice to the defendant that the answer must be signed. If this amendment is made, it would also require making conforming amendments to Civil Forms 2 and 3. Mr. Shea stated that he believes the more important issue is that clerks should not be accepting unsigned answers, and he asked for comments.

Francis Carney pointed out URCP 11 requires that pleadings be signed or they will be stricken if the party does not make the change after being notified. James Blanch noted that, in conjunction with this, URCP 10(d) requires the court clerk to review all papers filed. Both Mr. Shea and Mr. Carney stated that it appears that the URCP already requires that notice be given of the signing requirement before a default can be taken, and Mr. Wikstrom noted that it appears that what is needed is education, not amendment. Leslie Slaugh pointed out that many judges consider anything that is filed by a defendant as an answer, and that he believes Rule 4 should remain as it presently is. Todd Shaughnessy stated that despite all of this, he favors amending Rule 4 because some attorneys move to quash an unsigned answer.

After additional discussion, the consensus was that pursuant to Rules 10 and 11, clerks should not be entering a default unless they have first notified the defendant of the signing requirement, and that there is no need to amend Rule 4.

III. PROPOSED RULE 74–ATTORNEYS FEES

Mr. Wikstrom introduced Mark Olsen. As the representative for the Collections Section of the Utah State Bar, Mr. Olsen has asked to address the Committee about proposed Rule 74, with emphasis on the attorneys' fees schedule and various language in the Rule. Prior this meeting, Mr. Olsen provided the Committee with letters from several collection attorneys who have expressed displeasure with the proposed Rule. Referring to these letters and noting that the Collections Section has numerous concerns about Rule 74, Mr. Olsen presented several suggestions/requests.

Mr. Olsen first suggested that the dollar amount of the fees in the schedule be increased. The present schedule has been in effect more than ten years. Mr. Olsen noted that other attorneys can raise fees with the market, but collections attorneys cannot unless they depart from the schedule and, for many smaller attorneys, the amount permitted in the schedule is insufficient to cover their costs. Moreover, some judges refuse to allow any departure from the schedule, and even use the schedule as the guideline to determine a reasonable fee if a petition is filed. Mr. Olsen commented that he personally would be put out of business if he were to only follow the present schedule, and that collections attorneys are pleading for this change because only attorneys with a high business volume can survive using the schedule. Another concern is that some collections attorneys believe that they are being singled out for doing "routine" work. An example of this is garnishment, which actually includes a great deal of work, including tracking down debtors, verifying employment, and taking the employer to court if it refuses to start the garnishment. Mr. Olsen named some larger employers that must always be taken to court before they will comply with a garnishment.

This said, Mr. Olsen stated that collections attorneys are willing to live with the schedule if the dollar amounts in the lower categories are increased **and** if the Rule makes absolutely clear that collections attorneys may either use the schedule **or** petition for their fees. He expressed his concern that: (1) the "routine collection" language appears to limit judges to using the schedule,

(2) the language permits judges to define a "reasonable" fee by reference to the schedule, and/or (3) the language makes it appear that the fees amount in the schedule also includes post-judgment work.

Mr. Slaugh commented that the reason an increase in fee amount has been rejected in the past is because of inflation. He stated that he is not opposed to increasing the bottom and top rungs of the fees, but he is opposed to indexing the schedule to inflation.

Cullen Battle questioned whether it is proper to have a schedule that would allow an attorney to collect $250 in fees on a $150 debt. Mr. Slaugh pointed out that courts allow this now, and Mr. Olsen stated that if courts do not allow it, small creditors have no recourse but to write off the debt.

Mr. Wikstrom commented that it might be appropriate to notify small debtors prior to a collection action that they may have to pay more in attorneys' fees than the debt is worth. Mr. Olsen responded to this comment by describing how the collection process actually works. Preliminarily, he noted that one of his clients has told him it never sends anything for collection if the debtor has done anything at all to pay even a token amount, and that a debtor has already been notified several times before the matter is even sent for collection. After the failure of the debtor to make any attempt at payment, Mr. Olsen sends a routine collection letter giving the debtor 30 days to pay. The letter includes notice that there is a $50 fee at this point. Janet Smith asked Mr. Olsen whether he includes in the letter the amount that the debtor could potentially owe in collection fees. Mr. Olsen said that he does not because this would not be in compliance with the Fair Debt Collection Act.

Janet Smith then asked Mr. Olsen whether the language in the present Advisory Committee Note for Rule 74 is strong enough to assure that judges do not use the schedule as the standard for reasonableness. Mr. Olsen stated that he would not be opposed to even stronger language. Mr. Shaughnessy asked whether there has ever been a study of how much time is typically required to collect a debt. Mr. Olsen stated he did not know of such a study, but agreed with Mr. Wikstrom's comment that it can take as much time to collect $100 as $1000.

Mr. Shaughnessy also asked whether Mr. Olsen would proceed under the schedule more frequently if the fee amounts were increased, and Mr. Olsen stated that he would. Mr. Olsen stated that this increase would be particularly useful in one particular Utah judicial district that refuses to allow collections attorneys to depart from the schedule. Mr. Battle asked whether Mr. Olsen had any sense of how many attorneys use the schedule as opposed to filing a separate petition. In response, Mr. Olsen stated that many attorneys have left the practice because they did not realize that they were allowed to depart from the schedule. He also stated that when he began to depart from the schedule, he had to educate many judges to the fact that the schedule is optional. Mr. Olsen also stated that the only real rationale for the schedule is that it covers **routine** collections.

Mr. Slaugh then stated that there is a reason that the Committee selected the word "extraordinary"[1] as used in Rule 74, and asked whether substituting the word "considerable" would have its own set of problems. Mr. Olsen stated that the Collections Section prefers the word "considerable" since it comports with an attorneys' fees case involving collections that was recently decided by the Utah Supreme Court. *See N.A.R., Inc. v. Walker*, 37 P.3d 1068, 434 Utah Ad. Rep. 20 (Utah 2001). Mr. Wikstrom then suggested changing language to make the schedule a baseline, and allowing augmentation. Mr. Olsen stated that the Collections Section has discussed the option of having a schedule for post-judgment fees, but decided to drop it because it was unclear how this could be dealt with, *e.g.*, by motion, or another way. He also observed that collections attorneys are required to go to court more frequently lately since defendants are more often requesting hearings on garnishments.

Mr. Slaugh asked whether there is a problem with less ethical attorneys who file a suit so they can obtain attorneys fees under the schedule, even though the debtor is willing to pay. Mr. Olsen stated that there may be some attorneys who do this, but that most collections attorneys are too busy and harried to bother with it. Mr. Slaugh also commented that he can see a problem if the schedule is just barely enough to cover the work, since it means that more and more collections attorneys will avoid using the schedule, which means more work for the court. Mr. Carney agreed, noting that the schedule will soon become irrelevant if it is not changed.

Mr. Wikstrom again expressed concern about debtors paying more in attorneys fees than the amount of the original debt. Mr. Slaugh pointed out that debtors have already had notice and could have paid the debt when the fee was minimal. Mr. Olsen also noted that attorneys risk a FDCA lawsuit when they ask up-front for more than is authorized. He stated that the FDCA is already an effective curb on the practice of asking for more than authorized, since compliance with the FDCA is a serious matter because the attorneys' fees in such lawsuits can be huge.

Thomas R. Lee expressed his opinion that changing the attorneys' fees amounts is a legislative matter, and that he does not believe the Committee has authority to do this.

Janet Smith moved to approve the dollar amount changes in the Rule 74 schedule that have been proposed by Mr. Olsen. The motion was seconded, and approved with only Mr. Lee voting in opposition.

The Committee next discussed various language changes in Rule 74 to comport with Mr. Olsen's concerns, including the terms "considerable" and "non-routine." Mr. Olsen pointed out that the before the present Rule, the language "considerable additional work" was used, which is

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[1]"The schedule of attorneys fees includes fees for routine collection procedures. Attorneys fees awarded under the schedule may be augmented only for *extraordinary* efforts incurred in collecting or defending a judgment and only after further order of the court." Proposed Utah R.Civ.P. 74(c) (emphasis added).

consistent with the Utah Supreme Court's ruling in *N.A.R., Inc. v. Walker* (discussing CJA Rule 4-505).

A motion was made to change "collection" to "pre-judgment," to change "extraordinary" to "considerable additional efforts," and to strike both "incurred" and expended." The motion was seconded, and passed by a majority vote.

The next issue addressed was whether the language of Rule 74 makes it sufficiently clear that judges are not to use the schedule as the standard for determining reasonableness of fees. It was noted that the Committee's intent in making a change is to make sure that judges do not use the schedule as an opportunity to limit attorneys fees to those in the schedule. Mr. Battle and Mr. Carney made suggestions as to how the language could be changed to be more clear. After discussion, Mr. Wikstrom suggested that the language read that the "schedule does not limit the amount of a reasonable fee if an affidavit is submitted." The Committee agreed to this change.

The footnote to Rule 74 was also discussed, with several members commenting on the "augmentation" language. Mr. Shaughnessy asked how a judgment can be augmented, and Mr. Olsen stated that there is no real procedure for doing so in the Rule. Mr. Lee and Mr. Wikstrom pointed out that the original intent of the footnote was to make sure that judges knew augmentation would require extraordinary effort if an attorney chose to use the schedule. A discussion ensued on how attorneys could request augmentation. Mr. Olsen noted that the old CJA rule affirmatively stated that augmentation could be requested, and that he was concerned that judges would note the deletion in the present rule and decide that this means that augmentation is no longer allowed. It was agreed that language concerning augmentation should be added as subpart (b)(5) of proposed Rule 74.

Janet Smith moved to substitute "the amount of attorneys' fees" for "attorneys fees" in subpart (b)(4). The motion was seconded by Mr. Blanch and approved unanimously.

IV. RECODIFICATION OF CODE OF JUDICIAL ADMINISTRATION INTO RULES OF CIVIL PROCEDURE.

Mr. Wikstrom invited discussion and comments on all new and revised rules.

Rule 107: Mr. Shea and Mr. Lee had agreed at the last meeting to work on Rule 107. Mr. Shea stated that the revised Rule now dovetails more with the statute, and that his and Mr. Lee's intent with the revision is to point out that the overall model in this rule is a showing of good cause. The Committee discussed the revisions. Janet Smith asked the meaning of the term "social information," and Mr. Shea stated that it is a phrase taken from the statute. Mr. Slaugh asked whether lines 8-10 on page 32 of the Agenda can be read as mandating notice to the birth parent any time that the petitioner seeks information. Mr. Shea and Mr. Lee agreed that a change should be made in the language referenced by Mr. Slaugh, and Mr. Shea suggested that the first "if" clause be deleted and replaced with "if the court determines notice is necessary."

Rule 5: Mr. Lee pointed out what he believes to be a punctuation error on line 26. It was agreed that Mr. Shea would have the last word on this.

Rule 7: With regard to Rule 7(e) (Agenda, p. 18), Mr. Battle questioned whether the rule is sufficiently clear regarding hearings on injunctions. Mr. Wikstrom noted that there is an entire Rule dealing with preliminary injunctions, so this is sufficient. At Mr. Slaugh's suggestion, it was agreed to change the language of subpart (e) (line 14, page 18) from "in which it is requested" to "containing the request."

Rule 74: Mr. Battle suggested striking the first sentence of subpart (a). Mr. Wikstrom opposed this change. The Committee agreed to retain language stating that attorneys fees must be authorized by contract or law.

Rule 100: Mr. Shea stated that the Committee has recommended that this rule remain in the CJA, but that other committees are moving in a different direction. He stated that other committees are doing this because they believe the URCP are more high profile and more readily available. In light of this, Mr. Shea recommended that this Committee also include this rule in the URCP. In discussing whether to place Rule 100 in the URCP, the Committee discussed the distinction between juvenile and district courts, and made suggestions for language changes. Mr. Battle moved that the rule be placed in the URCP if satisfactory language can be worked out. Virginia Smith seconded the motion, which passed by a majority vote. Mr. Slaugh was asked to assist Mr. Shea in working out the language of Rule 100.

Rule 101: Mr. Wikstrom asked the meaning of the term "presiding district judge" in Rule 101 (Agenda, page 28, line 11). This use of this term was questioned, with Mr. Wikstrom pointing out that family law lawyers have never responded to requests for their input on this rule. Mr. Shea was asked to check whether the term "presiding district judge" is appropriate in this context.

Rule 102: It was agreed that the word "under" will be substituted for "designated" in subpart (a) of Rule 102 (Agenda, page 28, line 21).

Rule 104: Mr. Wikstrom stated that he is troubled by the repetitious language of Rule 104 (Agenda, page 29). Mr. Shea responded that the repetition is due to the fact that this rule is in the nature of a roadmap as it relates to other rules and statutes. Mr. Battle asked whether this means that Rule 104 must be changed any time there is a change in the statutes and rules on which it relies, and Mr. Shea said yes. Mr. Wikstrom and Mr. Shea then commented that the Committee does not have to adopt this rule because it is not independent law, and that the same thing could be accomplished with instructions on the website. Virginia Smith suggested that the rule be retained, but that work be done on it. Mr. Wikstrom responded to this suggestion by asking who will be responsible for monitoring Rule 104 to ensure that it is consistent with the statutes and rules on which it relies.

After discussion, Mr. Battle moved that Rule 104 **not** be included in the URCP. The motion was seconded by Mr. Waterfall and Mr. Carney, and was approved. After this vote, however, Terrie McIntosh moved to include Rule 104 in the URCP, but only up through the term "final judgment" in subpart (a) (Agenda, page 29, line 28). Virginia Smith seconded the motion, and it was approved.

Publication: Mr. Battle moved to approve all rules for publication as adopted and amended. The motion was seconded, and approved unanimously.

V. SMALL CLAIMS RULES.

Mr. Shea stated that an issue has arisen of whether a counterclaim that exceeds the jurisdictional dollar amount of a small claims action means that the entire lawsuit is moved to district court, or whether the counterclaim can be moved to district court with the original lawsuit remaining in small claims court. He stated that district judges prefer bifurcating, but justice court judges prefer moving the entire action to district court.

The Committee discussed numerous problems that can arise when the two actions are proceeding in different courts, including problems with inconsistencies in rulings, res judicata issues, and the fact of mandatory counterclaims. Mr. Battle raised the issue of whether Rule 13 could be amended to avoid the mandatory counterclaim issue, and Mr. Shaughnessy pointed out that this would still leave problems such as res judicata and collateral estoppel.

After listening to the discussion, Mr. Shea stated that the concerns expressed have convinced him that in cases where a counterclaim exceeds the statutory amount, the entire action should be moved to district court.

VI. 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, April 23, 2003, at the Administrative Office of the Courts.

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