MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, August 27, 2003
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, David W. Scofield, Francis J. Carney, Terrie T. McIntosh, W. Cullen Battle, Janet H. Smith, Leslie W. Slaugh, Paula Carr, Thomas R. Lee, R. Scott Waterfall, Virginia S. Smith, Honorable Lyle R. Anderson (via telephone), James Blanch, Honorable David O. Nuffer

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Glenn C. Hanni, Thomas R. Karrenberg, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Todd M. Shaughnessy

GUESTS: Rich Humpherys, Matty Branch

I. WELCOME, INTRODUCTION OF NEW COMMITTEE MEMBER, AND APPROVAL OF MINUTES.

Francis M. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom introduced the Honorable David O. Nuffer, United States Magistrate Judge for the District of Utah, who was recently named as a Committee member.

The Minutes of the May 28, 2003 meeting were then reviewed, and Thomas R. Lee moved that they be approved as written. The Motion was seconded by James Blanch, and approved unanimously.

II. NEW TRIAL JUDGE AFTER REMAND.

Mr. Wikstrom introduced Rich Humpherys, who has asked to be heard on the issue of amending the rules to provide for automatic appointment of a new trial judge when there is a remand after appeal. Prior to the meeting, Mr. Humpherys was provided with copies of earlier Advisory Committee Minutes.

Mr. Humpherys stated that he has strong feelings on this issue, and is in favor of an amendment to allow for automatic disqualification of a trial judge whose ruling is reversed on appeal. He stated that although he feels that no trial judge deliberately tries to subvert an appellate ruling that has resulted in remand, trial judges sometimes have strong feelings about the

merits of a case. As an example, he pointed to situations where a trial judge has made comments prior to appeal that a case has no merits. He stated that after remand, these same judges remain in a position to make rulings on discretionary matters that can undermine a case.

Mr. Humpherys believes it is better for the judicial system and for litigants' faith in the system for a trial judge to be replaced in all situations where a reversal is made on non-procedural grounds. He commented that he does not mean to imply by this that judges cannot be unbiased when they are reversed.

Leslie Slaugh asked Mr. Humpherys whether he contends that there should be a new trial judge only if there would be a new trial. Mr. Humpherys responded that he believes the rule should also apply to any substantive rulings, *e.g.*, summary judgment, and he would not limit the rule to new trial situations.

Mr. Wikstrom thanked Mr. Humpherys for his comments, and stated that the matter would be placed on the agenda for discussion at the Committee's next meeting.

III. RECEIPT OF RULE AMENDMENTS.

In response to a question about the method whereby the proposed amendments were submitted to the members of the Utah State Bar for comment, Tim Shea stated they were distributed in late April 2003 via an e-mail from the Bar. They were not published in the Utah Bar Journal. It was pointed out that the Supreme Court and Judicial Council have made a decision that these matters should be sent by e-mail.

The question was precipitated by a concern that there may be Bar members who did not receive the proposed amendments, and by the fact that nearly all comments received on the proposed amendments deal with Rule 73, which has been a subject of interest by attorneys who handle collections and who accordingly have been anticipating the publication of the proposed amendments. Some Committee members recalled receiving the e-mail, whereas other members did not remember ever seeing it and wondered whether there may have been a problem with distribution. The members discussed whether spam filters may have made the e-mail undeliverable for various reasons (*e.g.*, because it was a mass mailing), and suggested options for assuring that Bar members would know to expect an e-mail containing the proposed amendments.

In response to the discussion, Mr. Wikstrom stated that the Committee will still send the proposed amendments to the Supreme Court, but that the Court will be advised that the Committee does not have the same comfort level as it typically does that the proposed amendments were received by Bar members. Mr. Shea was asked to look into the issue of distribution in anticipation of the next publication for comment of proposed amendments.

IV. COMMENTS TO RULE AMENDMENTS.

The Committee then reviewed the comments to the proposed rules. There were two comments regarding Rule 7, and several comments on Rule 73.

A. Comments on Rule 7.

Bob Wilde recommended that Rule 7 allow thirty (30) days for a response to a motion for summary judgment, and fifteen (15) days for a reply in support of a motion for summary judgment. The Committee discussed Mr. Wilde's recommendation, but there was no motion to adopt it.

Johnnie Johnson recommended that Rule 7 require the party preparing an order to give notice that the proposed order is only a proposal, and that the rule include a time frame for filing an objection. Mr. Johnson's recommendation was considered, but there was no motion to adopt his proposal.

B. Comments on Rule 73.

The Committee considered written comments from the following individuals on the proposed amendment to Rule 73: Chad McKay, Paul Simmons, Judy Jorgensen, Stephen Elggen, Jonathan Jensen, Jonathan Thomas, Judy Dawn Barking, Neil Harris, Mark Olson, Doug Short, Peter Waldo, and Brian Steffensen. The comments generally fell into two categories: those who feel the schedule of attorneys' fees is too low, and those who feel the new schedule is satisfactory. There were also comments about the meaning of the term "significant additional efforts."

Mr. Lee stated he is not surprised that lawyers who work in this field would want the schedule to be higher, but pointed out these lawyers can always submit an affidavit and go outside the schedule if they would like higher compensation. He also reiterated his previously expressed opinion that this is inherently a legislative issue.

Janet Smith asked the members why they thought the schedule is sufficiently high, since she is concerned that it is not in keeping with typical hourly rates. Virginia Smith stated that she has handled collections, and that for the bulk of defaults the process is easy, which would mean that the schedule is sufficient. When dealing with a debtor involves a lot of work, however, she stated that an attorney can simply use an affidavit. Judge Lyle Anderson commented that although he would not object to an increase in the schedule, it appears to be sufficient when attorneys handle collections in bulk. Paula Carr stated that she has spoken to attorneys who handle collections, and most of them say that the schedule is sufficient in 70% of the cases, and that in the remaining cases they submit an affidavit. Mr. Slaugh pointed out that it is impossible to continue increasing the schedule because eventually the fee is more than the debt.

Mr. Wikstrom pointed to section (d), and asked whether the word "post-judgment" should be retained. After discussion, a motion was made to change the language of section (d) to read "Amount of Damages, Exclusive of Costs, Attorneys' Fees, and Post-Judgment Interest." The motion was seconded, and all members except Judge Anderson voted in favor of the change.

Judge David Nuffer pointed out that there appears to be two different standards and language in the rule that is not parallel. Mr. Lee agreed, and moved that the first sentence of section (d) be stricken. The motion was seconded, and approved unanimously.

Mr. Lee then asked whether the term "considerable additional efforts" should be defined. Mr. Wikstrom responded that the Committee has discussed this previously, and decided to live with the language as is and leave the interpretation to the discretion of the trial judge. Mr. Lee then asked whether there is any way to give guidance to trial judges. After a comment from Judge Anderson about what he would consider this to mean, Mr. Lee stated that he would prefer to leave the language as it presently is.

Mr. Blanch commented that the deletion of the word "routine" has removed a point of reference. Judge Anderson explained why he does not believe that this is so. Mr. Slaugh agreed with Judge Anderson, stating that he does not believe that this standard is any more vague than many other standards.

Frank Carney stated that he believes an advisory committee note would be helpful, and Mr. Lee responded that he does not believe that a note would solve the problem. After discussion by Judge Anderson, Mr. Carney, Mr. Blanch and others, Mr. Wikstrom asked the Committee what it would prefer regarding an advisory committee note. It was agreed that Mr. Shea will prepare a proposed advisory committee note before the meeting with the Supreme Court.

Cullen Battle then commented that he is uncomfortable with removing the word "additional" from the term "considerable additional efforts." Mr. Blanch moved that the language "considerable additional efforts" be retained and that an advisory committee note be included. Mr. Battle seconded the motion and it was approved unanimously.

Mr. Wikstrom stated that the proposed amendments to Rule 73 will be presented to the Supreme Court on September 10, 2003.

V. RULE 68. OFFER OF JUDGMENT.

The Committee discussed proposed amendments to Rule 68, and Mr. Battle presented his suggestion for amending the rule (which Mr. Battle had previously e-mailed to all Committee members). He stated that he had drafted the proposed amendment by comparing it with the federal rule. In response, Mr. Blanch commented that the federal rule is problematic and a trap for the unwary, since there is United States Supreme Court case law that states that if an offer

does not specifically state that it includes everything, it arguably does not. He pointed out that the big trap in the federal rule is that the term "costs and attorneys fees" is not included in the rule. Mr. Blanch stated that he believes the Committee's previous proposed amendment to Utah Rule 68 does make it clear that the offer includes everything.

The Committee discussed whether the language of the proposed rule makes clear that it includes everything , and whether the term "equitable relief" should be retained in the proposed amendment. After discussion, Mr. Blanch moved to strike the terms "damages" and "equitable relief." The motion was seconded by Debora Threedy, and passed unanimously.

Mr. Battle questioned whether it is clear exactly when an offer is under Rule 68 so as to invoke the rule. Mr. Wikstrom stated that unless the offer is served under Rule 5, it is not a Rule 68 offer. Mr. Battle stated that he would not like to see every offer of settlement swept into Rule 68 and considered an offer of judgment. Mr. Slaugh expressed his opinion that Rule 68 should always apply, whereas Mr. Blanch stated that he believes that the consequences of Rule 68 should be visited only upon those who intend to do so under the rule. Mr. Blanch suggested inserting the language that the offer must be made under "this rule." After discussion and a suggestion of appropriate language, it was moved that in order for Rule 68 to apply, the offer must be made expressly under Rule 68. The motion was seconded and approved unanimously.

Janet Smith moved to replace the last sentence of proposed Rule 68 with the last sentence of Mr. Battle's proposed Rule 68. The motion was seconded and approved unanimously.

Mr. Slaugh asked whether the Committee contemplated that a Rule 68 offer would be filed with the trial court. After discussion about whether the rule is sufficiently clear that the offer should not be filed with the court, it was agreed that this is sufficiently clear.

Mr. Slaugh moved to accept Rule 68 with all the changes that have been approved. The motion was seconded and approved unanimously.

Ms. McIntosh then asked that the Committee be permitted to review Rule 68 once again, with all of the amendments. Mr. Wikstrom stated that it would be included on the September agenda, but would not be discussed again unless there is an issue. Mr. Wikstrom also asked Mr. Blanch to review the United States Supreme Court case to which he had referred, and determine how it would relate to a situation where a jury finds no cause of action.

VI. ELECTRONIC FILING RULES.

Mr. Wikstrom asked for volunteers for a subcommittee to consider electronic filing and how that would affect the rules. Judge Nuffer and Mr. Carney volunteered to serve on the subcommittee, which will also include Mr. Shea. Mr. Shea stated that he would like to focus on the mechanics of moving a case through the system electronically. He stated that the Committee has the Supreme Court's approval to work on this issue.

VII. ADJOURNMENT.

The meeting adjourned at 5:45 p.m. The Committee's next meeting will be held at 4:00 p.m. on Wednesday, September 24, 2003, at the Administrative Office of the Courts.

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