MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 27, 2009
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Francis J. Carney, Todd M. Shaughnessy, Janet H. Smith, Jonathan Hafen, David W. Scofield, Cullen Battle, Steven Marsden, Honorable Derek Pullan, Lori Woffinden, Matty Branch

EXCUSED: Honorable David O. Nuffer, Thomas R. Lee, Lincoln Davies, Barbara Townsend, Honorable Anthony B. Quinn, Anthony W. Schofield, James T. Blanch, Leslie W. Slaugh

STAFF: Tim Shea, Trystan B. Smith

GUEST: Xue Song

Ms. Song is a practicing lawyer and administrative law judge visiting Utah from China as a part of an exchange program. She accompanied Mr. Wikstrom as his guest to observe the committee's discussions.

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the April 22, 2009 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

II. ABSTRACT OF JUDGMENT.

Mr. Shea brought a proposed amendment to Rule 58A to the committee. He indicated the Policy and Planning Committee of the Judicial Council recommended a rule describing an abstract of judgment. Currently (Utah Code Ann. § 78B-5-202(3)) provides that an abstract of a judgment entered in one court and filed in another has the same force and effect as in the first, but the statute does not describe what the abstract consists of. Mr. Shea proposed language describing an abstract of judgment under subsection (g) of Rule 58A.

Mr. Battle questioned the need for an abstract of judgment. Mr. Carney also questioned why a party would need to file an abstract of judgment instead of filing the judgment with the County Recorder's. Mr. Shea indicated in some cases the judgment, the document itself, may be destroyed over a certain period of time. He further noted that prosecutors, in the course of proving enhancements for prior convictions, may use an abstract of judgment to prove a prior conviction. Ms. Branch also noted that an abstract of judgment may be necessary for a writ of execution, or a garnishment.

Mr. Wikstrom suggested a revision to subsection (g)(4), revising the last clause of the subsection to state, "or, attaches a copy of the judgment."

Ms. Smith moved to adopt subsection (g) with the revisions Mr. Wikstrom suggested. The committee unanimously agreed to the proposed changes to Rule 58A with the suggested revisions.

III. RULE 58B. SATISFACTION OF JUDGMENT.

Mr. Shea brought Rule 58B to the committee. He indicated that while in the process of creating forms and instructions for pro se parties, he found a number of ambiguities and policy questions that warranted the committee's attention.

Mr. Carney suggested the committee submit the issues and proposed changes to a sampling of debtor/creditor lawyers and ask for feedback about the proposed changes.

Ms. Woffinden agreed to examine Rule 58B and suggest any changes she felt necessary.

The committee agreed with Mr. Carney's suggestion and agreed to revisit the issue at a future meeting.

IV. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom brought simplified civil procedures back to the committee. He noted that Mr. Shea incorporated the Institute's suggested changes into the rules for the committee's discussions. Mr. Wikstrom asked that the committee initially examine and discuss the suggested changes as broad concepts, and wait to address the details of the changes at a future time. The committee then proceeded to analyze the Institute's proposed changes to Rules 1, 8, 16 and 26.

The committee initially examined Rule 1. Mr. Scofield suggested that the language "and administered" should be revised to state, "and applied." The committee unanimously agreed to the revision.

The committee next examined Rule 8.

The suggested changes to Rule 8 would require a plaintiff to plead, in summary, a statement of facts on which the claim is based, the evidence supporting the factual statements, a

statement of the remedy sought, the monetary amount demanded, and the terms of any other remedy sought. The statements of facts must also set forth in detail the time, place, participants and events of the facts plead. Mr. Wikstrom characterized the proposed changes as pleading the "ultimate facts."

Mr. Hafen questioned whether requiring pleading with ultimate facts supported the committee's initial goal of increasing access to justice.

Mr. Carney questioned how the proposed changes were different than pleading with particularity under Rule 9. He further questioned why Rule 8 should not be amended to require pleading with particularity as the standard has been formulated under Rule 9.

Mr. Wikstrom questioned whether it was necessary to include the monetary amount demanded and the terms of any other remedy sought as a part of a party's claims for relief. Mr. Battle and Ms. Smith indicated that they had no objection to including the monetary amount as a part of the original claim. Ms. Smith noted that in certain cases plaintiffs will intentionally omit a monetary demand to avoid removal to federal court. Therefore, inclusion of the monetary amount would prevent such practices.

Mr. Shaughnessy noted that it would be more helpful to explain not only the monetary amount, but the category of damages claimed.

The committee next examined Rule 16.

The major revisions the Institute incorporated would (1) require the parties to appear at a pretrial conference, and (2) allow the Court to independently determine whether the parties' proposed discovery plan was proportional to the needs of the case. Mr. Wikstrom began the discussion indicating the second change did not coincide with the committee's principles. The committee wanted the parties to have independence in crafting discovery plans for their cases.

Judge Pullan noted that the changes would require a hearing to allow the trial judge to determine what was proportional.

Mr. Marsden questioned why the trial judge should not have the authority to oversee case management orders to avoid the needless waste of the parties' resources and to further judicial economy.

Mr. Wikstrom and Mr. Battle indicated it would be impracticable to require judicial oversight in every civil case.

Judge Pullan noted that although unpopular, early judicial involvement may be necessary to accomplish the committee's goals.

Mr. Carney suggested re-emphasizing proportionality, and then allowing the parties to move for judicial intervention. Mr. Hafen responded by questioning how the trial judge would

know what was proportional, unless the complaint stated the amount-in-controversy. Mr. Hafen also questioned whether it was wise for the committee to require a lawyer to give a client a comprehensive discovery budget as a part of the civil procedure rules.

Mr. Carney suggested the committee could get back to its initial goal of allowing access to justice by crafting the revisions to focus on cases worth less than $100,000. He questioned how the simplified rules could afford the public access to justice in cases worth under $100,000? Mr. Carney went on to suggest a very limited, but mandatory discovery process for low money value cases, which allowed a party to show good cause to opt-out.

Mr. Wikstrom asked why the rules should not require all cases to be subject to a very limited, but mandatory discovery process. If a party wanted to opt-out, then the party would have the burden to show the discovery requested was necessary and proportionate.

Finally, the committee examined Rule 26.

Mr. Wikstrom initially noted the committee's principles contemplated that initial disclosures would not be simultaneous, but successive. The committee agreed that within thirty days after filing the complaint, the plaintiff should file initial disclosures, and then the defendant(s) would be given, a yet to be determined time, to file initial disclosures.

Mr. Hafen noted that the suggested language, "possession and control that relate to the proceedings," under subsection (a)(1)(c) was too broad. Mr. Wikstrom further noted that the language was inconsistent with the committee's principles. The committee wanted the documents that a party may want to use as exhibits at trial to be disclosed. He suggested that a party should produce the documents that the party thinks it might want to use at trial, and disclose the identity of the people that the party might call as witnesses, in the party's initial disclosures.

Mr. Battle suggested that the committee consider revising Rule 26 to require a party to produce documents, instead of simply disclosing categories of documents to be exchanged. Mr. Battle also suggested revising Rule 26 to require a party to produce everything in their possession or control that was relevant.

Mr. Marsden cautioned that requiring people to produce documents at the initial disclosure stage may require more time after filing of the complaint for the production of initial disclosures. He also cautioned the committee to consider electronic discovery and the hardship with producing electronic discovery during the initial disclosure phase.

Mr. Carney noted the reason the current iteration of Rule 26 allowed the description of categories of documents is because documents may not be in a party's possession, custody or control at the time of filing of the complaint, for example in personal injury cases or employment cases.

Mr. Hafen questioned whether requiring production of documents would hurt the committee's goal to increase access to justice.

Mr. Wikstrom asked the committee to consider whether it needed special provisions for personal injury cases and employment cases.

Mr. Hafen noted in the Institute's suggested changes to subsection (b)(1) that a party is not entitled to disclosure of information simply because it appeared reasonably calculated to lead to the discovery of admissible evidence. He indicated the revision would amount to a 'sea change' in current practice.

Mr. Scofield noted that the language relevant to the issues in the case as they have been raised in the pleadings, under subsection (b)(1), may limit discovery on credibility and impeachment issues.

Mr. Hafen also questioned the language in subsection (b)(3) that would allow for the trial judge to shift the cost of discovery. He suggested rewording the language to allow the trial judge to require the requesting party to pay for any additional requested discovery.

The committee concluded its discussion by debating Mr. Hafen's proposal that in every case with an amount-in-controversy under $150,000 that no expert discovery would be allowed, a trial date would be set within 120 days, and a party would be allowed no more than two depositions. The committee also debated, whether or how, a party should be able to opt-out if the case warranted.

After considerable discussion, the committee agreed to revisit simplified rules and the Institute's remaining changes, at a future meeting.

V. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, June 24, 2009, at the Administrative Office of the Courts.