MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 23, 2003
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, David W. Scofield, Thomas R. Karrenberg, Francis J. Carney, Terrie T. McIntosh, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, W. Cullen Battle, Leslie W. Slaugh, Debora Threedy, Thomas R. Lee, Virginia S. Smith, Honorable Lyle R. Anderson, James T. Blanch

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Janet H. Smith, Glenn C. Hanni, R. Scott Waterfall, Todd M. Shaughnessy, Paula Carr

GUESTS: Matty Branch, Douglas G. Mortensen, Richard Burbridge, Michael Zundel, Robert Wallace, Gregory Saylin

I. WELCOME AND APPROVAL OF MINUTES.

Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the March 26, 2003 meeting were reviewed, and a typographical error on page 5 was pointed out. Thomas Karrenberg moved that the minutes be approved with this change. The motion was seconded by James Blanch, and the minutes were approved as amended.

II. NEW TRIAL JUDGE AFTER REMAND.

Mr. Wikstrom introduced the first matter for consideration, which is a proposed rule that would allow successful appellants to request automatic disqualification of a trial judge in situations where there is a remand after reversal on appeal. Mr. Wikstrom stated that this issue has been before the Committee on two prior occasions, and the decision on those occasions was not to proceed. Four lawyers/guests were present to voice their support for the proposed rule.

A. Proponents of Proposed Rule.

Mr. Wikstrom first introduced Douglas Mortensen, who has submitted various materials to the Committee to support his position. Mr. Mortensen raised three points that he believes show that further consideration of this issue is warranted. His first point is that the proposed rule is strongly supported by successful appellants, and he cited some statistics to support his position

that most Utah trial lawyers are in favor of the proposed rule. His second point is that highly successful Utah trial judges routinely recuse after remand, and that the practice has been lauded by the United States Court of Appeals for the Second Circuit. As support for this point, Mr. Mortensen pointed to an article in the *Salt Lake Tribune* (Aug. 4, 2002) which attributed to federal district court Judge Dale Kimball and Judge David Winder the practice of recusing themselves in cases where they are overturned by a higher court. Mr. Mortensen's third point is that he believes the reasons for opposing such a rule do not stand up under scrutiny, *e.g.*, he does not believe this rule would increase costs, and pointed out that all Utah districts have at least two judges and that he has found no reported cases where juvenile court judges have been reversed.

Mr. Mortensen also addressed several concerns raised in the past. Regarding the issue of potentially having to change venue in order to obtain a judge who has not recused or been disqualified, Mr. Mortensen stated that he has found few reported cases showing reversals in smaller localities, and that the issue should be "prejudice" and not "costs." He also disputed that this proposed rule would impugn the integrity of the trial judge, pointing out that Judge Winder recuses after a reversal. Finally, he disagreed with the argument that this rule is susceptible to abuse and tactical gamesmanship, noting that the proposed rule simply gives latitude to successful appellants to request a new judge if they **choose** to do so.

Mr. Wikstrom then introduced Richard Burbridge, who also supports the proposed rule. Mr. Burbridge stated that he is weighing in on this issue only because of his great respect for the judiciary. He commented that when a trial judge is reversed, the judge must not only be concerned about re-trying the case, but must also be concerned about questions as to whether the judge is now prejudiced because he or she might be angry about the reversal. Mr. Burbridge believes that, to the client, this casts a shadow on the judge's verity. He believes that the proposed rule actually protects and removes pressure from the judge. He stated that the process itself is the most important thing, and that Judge Winder should be used as a benchmark because he recuses for all the right reasons.

Mr. Wikstrom next introduced Robert Wallace. To illustrate why he supports the proposed rule, Mr. Wallace discussed a case where he represented the plaintiff in federal court. Mr. Wallace stated that the trial judge was reversed twice on summary judgment before finally recusing of his own volition after the second remand.[1] Mr. Wallace stated that, after the

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[1]NOTE: With regard to the first reversal, the Tenth Circuit affirmed the trial court's dismissal of all claims except plaintiff's First Amendment free speech claim, holding that summary judgment on that claim was "premature." The trial court was affirmed on its dismissal of plaintiff's Title IX, procedural due process, and substantive due process claims. The Tenth Circuit also affirmed the trial court's dismissal of the free speech claim by plaintiff's parents. The Tenth Circuit's second opinion affirmed the trial court's dismissal of the free speech claim against one defendant, and reversed it as to two other defendants. The Tenth Circuit made special note in this opinion of the trial judge's inappropriate comments at the evidentiary hearing

evidentiary hearing that the judge held pursuant to the second summary judgment motion, both Mr. Wallace and his client had serious concerns about whether the judge viewed the case as seriously as they did. He also stated that the proposed rule is a matter of fairness to litigants, and not an insult to judges.

Mr. Wikstrom next introduced Michael Zundel. Mr. Zundel stated that it is his opinion that the proposed rule would act as a safety valve for the system, and that a judge should not feel invested in a case. He commented that there can be problems after a remand and that there ought to be an "out" for the successful appellant. As support for his position, he referred to a case where a judge was reversed on twenty findings of fact that were clearly erroneous. He expressed his belief that the proposed rule is salutory and helpful to the system.

B. Discussion.

Mr. Wikstrom asked for comments and questions from Committee members. The Committee members participated in a lengthy discussion, which included members' comments, and questions directed to Messrs. Mortensen, Burbridge, Wallace and Zundel about issues of concern. The questions and comments included the following:

Leslie Slaugh stated that he is essentially in favor of the proposed rule, and that he does not see why it should be limited to successful appellants. Mr. Karrenberg asked Mr. Mortensen whether this rule would apply in situations where there is a preliminary injunction and, if applied to all litigants, whether the trial judge would know who had requested disqualification. Mr. Mortensen stated that he sees no reason why the rule should not be written so as to apply to all litigants and situations, and that if any litigant can request disqualification, the judge should not know who had requested it. The Committee members discussed these issues.

Mr. Lee, Judge Lyle Anderson and others raised questions and concerns about the potential for gamesmanship and abuse. Judge Anderson gave an example of what he believes is gamesmanship in his district, and said that he is very concerned about this. He also believes that it is suspect that only successful appellants are included in the survey cited. Mr. Lee also had concerns about the survey, and stated that he does not believe that Judge Kimball and Judge Winder always recuse after reversal or remand. Judge Anthony Quinn commented that he clerked for Judge Winder several years ago, and that he could think of cases where Judge Winder did not recuse after reversal.

Cullen Battle noted that the proposed rule appears to apply only to remands after trial, and questioned how to deal with situations where there is a remand for new findings and not necessarily a new trial. Frank Carney commented that a big downside of the proposed rule would be the inefficiencies of having a new judge on potentially every new trial. In response to these

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that the judge held to "resolve" issues on summary judgment.

comments, Mr. Lee stated that the types of questions and issues that are being raised illustrate why recusal should be limited to the discretion of the trial judge, since there are always nuances.

Mr. Slaugh and others commented that the most persuasive argument for the proposed rule is the one involving perceptions of clients. Mr. Burbridge agreed, stating that this is the place to start and that it is "worthy of this Committee's work to advance the matter and eliminate the perception of clients of unfairness." Mr. Burbridge also stated that he believes that it is an advancement even if the proposed rule is strictly limited to new trials.

The Committee also discussed bias and judges, particularly after reversal on summary judgment. Mr. Wikstrom commented that he believes that advocates are in the poorest position to discuss and decide who is biased, and Mr. Lee commented that he believes it is inappropriate to make a rule that makes it appear that all judges are biased after reversal. Mr. Carney noted that he is aware of a poll that shows that some judges actually are biased after being reversed.

Debora Threedy commented on the issue of delay as a strategic choice by some attorneys, and noted that disqualifying a trial judge assists those who wish to delay. Mr. Karrenberg discounted the issue of delay, and observed that most delay is caused by the trial judge's calender.

After Mr. Wikstrom noted that the proposed civil rule would also apply in the criminal context pursuant to Rule 81, the question was raised as to how many civil cases would be affected by the rule. Judge Anthony Schofield commented that he once checked the percentage of reversals on summary judgment, and found that approximately 50% of summary judgments are reversed. He expressed concern that the proposed rule would further weaken summary judgment as a judicial tool.

The discussion was ended due to the press of time and other matters. Mr. Wikstrom stated, however, that the Committee will address it again at a later time. Messers. Mortensen, Burbridge, Wallace, and Zundel were thanked for taking the time to appear and provide their comments.

III. SMALL CLAIMS RULES.

Tim Shea stated that he has met with court clerks and the Board of District Court Judges about the small claims rules, and that the main concern is how to deal with counterclaims that exceed the small claims limit. He commented that it appeared to him at the last meeting that the Committee was opposed to transferring the counterclaim to district court, while retaining the original action in small claims court. He then asked for comments about the proposed rules.

Terrie McIntosh asked why there is a Rule 11 provision, since the parties are usually pro se and do not understand Rule 11. Mr. Shea responded that there was a need for some type of sanction, and that this has been kept as simple as possible. Mr. Slaugh commented that Rule 11

is specifically excluded from small claims actions, and Mr. Battle questioned how pro se parties can be held to the same standards as lawyers. With response to the "standards" question, Mr. Shea stated that small claims court is the collection arm of some businesses and that those businesses know exactly what they are doing. Mr. Slaugh stated that while there should be some latitude for pro se parties, under recent Utah Supreme Court opinions, repeat pro se litigants should be held to the same standards as lawyers.

Mr. Wikstrom asked for a show of hands on those who believe that the small claims rules should include some provision similar to Rule 11, and a majority of the Committee agreed that it should. After further discussion regarding pro se litigants, Mr. Battle moved to include the following provision in the small claims rules: "Legal contentions must be asserted in good faith." Mr. Carney seconded the motion, and it was approved by a majority of the Committee.

The next issue raised was use of both "business days" and "calendar days" as terms in the rules. After discussion and explanation of the reason for the distinctions, a majority of the Committee agreed that the use of both terms should be retained. Mr. Slaugh next expressed concern that the use of the term "summons" in Rule 3 suggests that a separate summons is needed. Mr. Shea stated that the affidavit and summons are contained in one document, *i.e.*, the party completes the affidavit and the court clerk completes the summons. Mr. Shea agreed that this may be confusing and that the term "and summons" will be deleted.

The Committee then discussed whether a small claims action should be bifurcated when a counterclaim exceeding the statutory limit is filed. Mr. Slaugh stated that he believes that everything should be transferred to district court, but expressed concern that this will lead to the filing of frivolous counterclaims. Mr. Battle and Mr. Blanch commented that if everything is transferred to district court, Rule 11 would then apply. Issues were also raised about the res judicata effect if the case is bifurcated. Mr. Shea stated that under Supreme Court rulings, even if there is a previous small claims ruling, a counterclaim can be filed in district court.

IV. SERVICE BY MAIL.

Mr. Battle introduced Gregory Saylin, who has requested an opportunity to present his concerns about the service by mail provision in the rules. Mr. Saylin stated that his concerns have arisen in light of the new Utah SPAM statute, and the fact that class actions are being filed under that new statute. He stated that some Utah lawyers have mailed hundreds of complaints to out-of-state law firms, and that many out-of-state attorneys are taking the position that their clients have not been served since the proof of service required is return of receipt, and the receipt has not been signed by an authorized person. (Ms. McIntosh commented that, in many cases, receipts are being signed by employees in a *corporate defendant's* mail room.)

Mr. Battle noted that the problem is that the Utah rules contemplate that service must be on an agent or someone authorized to receive service, but someone working in a mail room does not know this, and there is no way to know it from the wrappings of the documents mailed.

Since plaintiffs' attorneys have no idea whether the person signing the receipt is authorized to do so, they are simply filing for default when no answer is filed. Mr. Battle suggested that the receipt should be required to state "**YOU ARE BEING SERVED**" in bold letters.

Noting the press of time, Mr. Wikstrom stated that this issue is only being raised today. There is no intention to resolve it at this time, and it will be addressed again at a later time.

V. RULE 68: OFFER OF JUDGMENT.

Mr. Wikstrom informed the Committee that the issue of Rule 68's Offer of Judgment has been raised in a legislative committee. He asked for volunteers to contact Representative John Dougall, and inform Representative Dougall of the issues that the Committee has been discussing with regard to Rule 68. Judge Anderson, Mr. Slaugh, and Mr. Carney volunteered to contact Representative Dougall. They will report back to the Committee on the discussion. Judge Schofield suggested adding Steve Densley of Strong & Hanni to the group, since Mr. Densley has been involved in this issue.

VI. RULE 26: DELETION OF DISCLOSURE AND DISCOVERY PLAN EXEMPTION FOR SELF-REPRESENTED LITIGANTS.

Mr. Shea briefly raised an issue that has been presented to the Committee concerning Rule 26's exemption for pro se litigants. Under Rule 26, there is no requirement of initial disclosures or an attorneys planning meeting in cases which involve a pro se party. This exemption is opposed by some pro se litigants. It was agreed that this issue will be held over to the May 28, 2003 Committee meeting.

VII. AUGUST 27, 2003 MEETING.

Mr. Wikstrom announced that Committee members should plan to attend a previously unscheduled Committee meeting which will be held Wednesday, August 27, 2003. This meeting will likely be needed in order to consider comments on the proposed rules' amendments.

VIII. 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, May 28, 2003, at the Administrative Office of the Courts.

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