Agenda

Advisory Committee on Rules of Civil Procedure

May 24, 2000
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
Comments to Rules	Peggy Gentles Guests
Simplified rules of procedure for small claims cases	Judge Quinn Peggy Gentles
Rule 4. Service	Peggy Gentles
Rule 54(e). Prejudgment interest	Peggy Gentles
Rule 63A. Change of judge upon remand after appeal	Tom Karrenberg

Meeting Schedule

September 27
October 25
November 29 (5th Wednesday)
December: No meeting

~~DRAFT MINUTES~~
Approved

MINUTES

Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure

Wednesday, May 24, 2000
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Cullen Battle, Mary Anne Wood, Paula Carr, Debora Threedy, Judge Boyce, Jim Soper, Glenn Hanni, Terrie McIntosh, Judge Hansen, Judge Quinn, Leslie Slaugh, Tom Lee, Judge McIff, Virginia Smith

STAFF: Peggy Gentles

GUESTS: Dick Carling and Larry Peterson

I. WELCOME AND APPROVAL OF MINUTES PUBLISHED FOR COMMENT

Fran Wikstrom welcomed the Committee members to the meeting. Judge Quinn moved that the minutes of the April 19, 2000, meeting be approved. Leslie Slaugh seconded the motion. The motion passed unanimously.

II. COMMENTS TO THE RULES

Fran Wikstrom referred the Committee members to the proposed changes to Rules 3 and 4 that would remove the 10-day summons provision. Mr. Wickstrom noted that many comments had been submitted to the Committee. He had invited two of those who commented to address the Committee. Mr. Wikstrom introduced Dick Carling and Larry Peterson and thanked them for taking the time to attend the meeting.

Mr. Carling stated that he had reviewed the other comments submitted on the proposed changes. While he thinks that the proposal is unwise, he does not agree with some of the reasons given by other commentors, especially assertions that the changes are revenue driven. Mr. Carling distributed information that he had received from the constable who serves 10-day summons for his office. The information contained the number of summonses sent for service by various clients, the number of summons that were served, and the number of summonses that were returned unserved. Mr. Carling noted the large proportion of summonses that were returned unserved. Mr. Carling stated that these figures represented summonses directed to people who had received numerous letters at the address prior to issuing the summons. He does not issue a summons to defendants if he has an indication that they may not be at the address.

Mr. Carling noted that many of the cases in which he uses a 10-day summons are bad check cases and are often for relatively small amounts. He noted that if clients had to file the complaint with the court and pay the filing fee on these cases, which would be largely claims for under $2,000 the burden on the plaintiffs would be significant. In response to a questions from Judge Boyce, Mr. Carling stated that, if a summons is returned unserved, his office turns the defendant's name over to a credit bureau to attempt to locate. Mr. Carling stated that a number of years ago a collections practices task force had been convened. One of the reforms resulting from that task force was the Rule 3 change to require that a copy of the complaint be served with the summons. In Mr. Carling's opinion, attorneys should be filing a summons and complaint as soon as they receive the return of service. He does not believe that the practice cited in some letters of settling between the service and filing is an appropriate use of the 10-day summons although he acknowledges that it does occasionally happen. Mr. Carling noted that a practice that was discussed by the collections practices task force not followed-up by any other agency was a concern that process servers may be getting money from creditors indirectly by arranging a flat fee for service with creditors but charging mileage on the return of service which is passed on to the defendant.

Mr. Carling stated that he had provided Committee staff a copy of a 1997 report of the Legislative Auditor General. The report indicated a large portion of the cases filed with the court were under $2,000. He noted that, since claims for bad checks are often so small, law enforcement is unable to provide the resources to prosecute a criminal action. Mr. Carling referred the Committee to the comments of Mary Larson, a clerk in the Murray District Court. He noted that she had stated that having a 10-day summons required the handling of the file only one time; with a 20-day summons the file is handled numerous times. Leslie Slaugh asked about the statement from some clerks that there are numerous answers which get filed when the complaint has never been filed. Mr. Carling responded that he had spoken with the clerk's offices in two courts and they did not report a significant problem. Fran Wikstrom asked if Mr. Carling knew the percentage of summonses that he served that did not result in a complaint being filed. Mr. Carling responded that he rarely does not file the complaint if service has been attained. In his experience, many more cases settle prior to service than between service and filing of the complaint.

Larry Peterson noted that one of his clients is Intermountain Health Care. In his opinion, the 10-day summons serves a good purpose. If it is abolished, his client would be considering filing 4,000 more complaints than it does now. In Mr. Peterson's opinion, this would clog-up the courts' dockets. He noted that if he was required to file the complaints, presumably a similar high proportion of these cases would not result in completed service of process and would need to be dismissed after 120 days. Mr. Peterson also noted that if the complaint was filed, conceivably when the debtor could not be found, there would be many requests for alternative service such as publication. In his opinion, alternative service often does not result in actual notice to defendants.

In response to a question from Judge Boyce, Mr. Carling stated that his guess was that 80 to 90 percent of the cases filed using a 10-day summons result in a default judgment or stipulation to a payment plan that ultimately results in a dismissal. He added that he had received information that

nationwide approximately 25 percent of the cases sent for collection actually result in the creditor receiving full payment. Leslie Slaugh stated that many of the comments that the Committee received stated that cases were often resolved between service and filing. These statements would indicate that many practitioners may be waiting until the 10th day to actually file the complaint. Mr. Slaugh stated that if that is happening, it should be addressed. Mr. Carling agreed stating that in his opinion it would be foolish not to file immediately upon receiving the return of service.

Fran Wikstrom stated that Committee has been concerned that some practitioners utilize a 10-day summons with no intent to actually file a complaint. Dick Carling replied that such a use of the 10-day summons would be a clear violation of the Fair Debt Collection Practices Act. The State Bar should be addressing any ethical violations. He noted, however, that concrete evidence of such practices is difficult to find. Mr. Carling stated that in some types of cases, attorneys fees are available only after the action is "commenced." Under current Rule 3, an action may be commenced upon service of the 10-day summons. Mr. Peterson stated that he agreed with an earlier point made by Mr. Carling that if there is an ethical problem, the remedy is enforcement rather than changing the rule and punishing those creditors and attorneys who are practicing appropriately. Debora Threedy noted that, if attorneys fees were attaching when the action was "commenced," one possible change to the rule would be that an action is commenced using a 10-day summons upon filing of the complaint.

Fran Wikstrom noted that Committee staff had looked at other states and determined that Utah is one of only seven states with a similar process. Mr. Carling responded that it is not appropriate to compare between states due to significant differences in judgment collection remedies and other practices.

Larry Peterson stated that there had been much talk in the Bar recently about being more user friendly. Clients should be provided a economical means of collecting relatively small amounts of debts. Judge Hansen agreed with Mr. Peterson. In response to a question, Mr. Carling stated that judicial economy would not be served by having many of the cases that currently use 10-day summonses be filed as a small claims cases. He noted that all small claims cases are calendared for trial; however, many debt collection cases may be appropriate for a default entered by a clerk. Judge Boyce stated that many of his concerns around collection practices arise from the cases that he sees filed under the Fair Debt Collection Practices Act which he views as involving abusive practices which greatly inflate small amounts with attorneys fees and court costs. Mr. Carling stated that such cases are not common. Mr. Carling noted that the rule previously provided that the action was commenced upon issuance of the summons rather than service of the summons. Judge Boyce noted that the reason that the rule had been changed was a use of "sewer service" where no meaningful attempt to actually serve defendants was made.

Mary Anne Wood stated that the defendants in cases using 10-day summons are aware of the claims by the creditor and of the possibility of legal proceedings. Many creditors incur legitimate attorneys fees in preparing to sue debtors. Judge Boyce stated that many people do not respond to creditors because they do not feel that they owe the money. Ms. Wood responded that people with

legitimate defenses should raise them in the court proceedings. She stated that studies show that many people involved in small debt collection cases are repeatedly failing to pay or writing bad checks. Judge Hansen stated that he has no difficulty with an attorney collecting legitimate fees and thinks it is hard to justify the increased imposition of filing fees that the rule change would require. However, possibly the Committee's concerns about unethical practices could be addressed by recommendation of formation of a committee that could review complaints from debtors. Judge Boyce stated that he was concerned that whenever people are invited to file complaints, there is a significant number of frivolous complaints filed.

The Committee members discussed their original reasons for proposing the change. Fran Wikstrom noted that the Committee had had concerns about the process. When staff reviewed other states and saw what a small minority allowed a similar process, the Committee felt the change was appropriate. He noted that the motion to publish a change for comment passed unanimously. Virginia Smith stated that she recalled the discussion at the meeting had also surrounded confusion by defendants on when to call in to the court. Peggy Gentles stated that the Rule 3 had originally been brought to the Committee to address a concern about the effect of the change to Rule 6 on the 10 days under Rule 3. Because Rule 6 now requires that the 10 days not include weekends and holidays, the complaint may be filed later than 13 days after service.

Judge Boyce stated that he would like to hear from an organization like Utah Legal Services to see if it reports abusive practices. Fran Wikstrom asked Paula Carr about the responses from the Clerks of Court. Ms. Carr noted that, while opinion was mixed, many clerks supported the change because it would result in a decrease in phone calls to the court by defendants trying to find out if the complaint had been filed.

Jim Soper asked Mr. Carling about the numbers provided by the constable's office. The number of summonses returned included summonses that had been recalled. Mr. Carling stated that summonses will be recalled if the attorney knows that a defendant has moved or has filed bankruptcy. This recalling will save the creditor mileage fees from the constable. Fran Wikstrom thanked Mr. Peterson and Mr. Carling for taking the time to come talk to the Committee.

Paula Carr stated that she did not think that all complaints that are currently prepared for service on a 10-day summons will necessarily be filed by creditors. Leslie Slaugh stated that his impression is that the 10-day summons does provide a valid service. If the goal is to address the debtor having to wait to call, the rule could be changed to require the filing of the complaint immediately upon receipt of the return of service. Debora Threedy stated that she is concerned about the potential for lawyers to serve 10-day summonses with no intention of actually filing the complaint. Judge Boyce agreed with Ms. Threedy. Fran Wikstrom stated that his concern is that legal process may be used inappropriately with no ability for supervision by a court. Virginia Smith suggested that in addition to hearing from Utah Legal Services, Utah Issues be contacted. Tom Lee stated that if there was any way to get information about how many are served but not filed that would be very helpful. Mary Anne Wood stated that the remedy for the concerns addressed by the Committee is the Fair Debt Collections Practices Act. Leslie Slaugh reiterated his suggestion that

the rule be changed to require that complaints be filed upon receipt of the return of service. Cullen Battle responded that such a rule would be unenforceable because the court would not know about those parties who did not comply with the rule. Fran Wikstrom suggested that the rule state that if the complaint was not filed within 5 days of service, the complaint would be dismissed with prejudice.

In response to a question by Fran Wikstrom, the Committee asked that more information be gathered. It asked that Utah Issues, Utah Legal Services, and the State Consumer Protection Division be contacted for any relevant information. Additional information should be sought from the clerks. Also, the other states' rules with similar provisions should be consulted to see if they contain requirements that may address the Committee's concerns short of removing the 10-day summons. The Committee asked that clerks in the high volume courts of Murray and Sandy be contacted.

Fran Wikstrom stated that his impression was the Committee was rethinking its position on the 10-day summons and would continue its investigation at the next meeting.

Mr. Wikstrom referred the Committee to the other rules which had been published for comment. The Committee discussed Judge Orme's comment that the language in Rules 26 and 37 should be changed to require a specific statement of what counsel has done to resolve the issue. The Committee decided to leave the sufficiency of the certification to the discretion of the judge noting that the proposed new language is identical to the federal rules. Judge Boyce moved that the proposed changes to Rules 10, 12, 26, 37, 45, 64D, and the subpoena form be recommended for adoption by the Supreme Court. Judge Quinn seconded the motion. The motion passed unanimously.

III. SIMPLIFIED RULES OF PROCEDURE FOR SMALL CLAIMS CASES

Fran Wikstrom noted that all Committee members should have received a draft of proposed rules and changes to forms by e-mail or fax prior to the meeting. He asked that Committee forward any comments to Peggy Gentles for incorporation and consideration at the next meeting.

IV. ADJOURN

The Committee decided to continue its practice of not meeting during summer. Fran Wikstrom noted that Judge McIff has a consistent conflict in his calendar with the Committee's regularly scheduled fourth Wednesday meetings. He asked Judge McIff to contact him over the summer to come up with a proposed meeting schedule for the next year. There being no further business the meeting adjourned.