

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

NOVEMBER 28, 2012

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Barbara L. Townsend, Terrie M. McIntosh, Francis J. Carney, Lori Woffinden, Honorable John L. Baxter, Honorable Todd M. Shaughnessy, W. Cullen Battle, Jonathan O. Hafen, Honorable Kate Toomey

TELEPHONE: Honorable Lyle R. Anderson

STAFF: Tim Shea, Sammi Anderson, Diane Abegglen

EXCUSED: Honorable Derek P. Pullan, Steven Marsden, Honorable Robert J. Shelby, Janet H. Smith

I. MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the October 24, 2012 minutes. The committee unanimously approved the minutes.

II. CONSIDERATION OF COMMENTS ON PROPOSED RULES.

Tim Shea led a discussion regarding proposed changes to Rule 5, regarding the certificate of service requirement. Mr. Shea suggested modifying existing subparagraph (d), rather than inserting the proposed new language in a new subparagraph (f). The committee discussed keeping the new, separate subparagraph (f), but deleting a potentially redundant sentence from existing subparagraph (d). The judges on the committee emphasized the need to have a certificate of service attached to the relevant pleading, and for that certificate of service to specifically identify the pleading to which it is appended. The committee approved this change.

Mr. Shea discussed the comments to the proposed amendments to Rule 10, specifically regarding requiring attorneys to use on court filings the same physical address as the address that is on file with the Utah State Bar. Mr. Shea reported that the courts would be satisfied with a provision in proposed subparagraph (g) to Rule 5, stating that the courts will send notices to the e-mail address on file with the Utah State Bar, in the case of attorneys, or, in the case of a party, to the email address provided by the party. A motion was made to delete the proposed language requiring use of the same address, email address and telephone

number from Rule 10(a)(3), and to add the above-referenced language to proposed subparagraph (g) of Rule 5. The committee approved the motion unanimously.

Mr. Shea then discussed comments to the proposed amendment requiring that the parties identify the discovery tier in the caption. The purpose for the change is so that the court clerk can record the discovery tier in the court case management system. There were no comments to the remainder of the proposed changes to Rule 10 or Rule 11.

Regarding changes to Rule 26, Mr. Shea reminded the committee of an earlier discussion regarding triggering Rule 26 disclosure deadlines to the filing of the answer, as opposed to the service of the answer. Mr. Shea noted that one problem is that the filing of the answer, at least until e-filing, may not always coincide with service. However, Mr. Wikstrom noted that the rule already requires that service happen first, followed by filing within a reasonable time. Because the change has not been sent for comment, a motion is required to change Rule 26(a)(2)(A) to require Plaintiff's disclosures within 14 days of "filing", as opposed to service, of the first answer to the complaint. The motion was made and unanimously approved.

Mr. Shea next discussed whether a similar change should be made to Rule 26(c)(5), *ie*, whether the language should be changed from when "first disclosure is due", to when "answer is filed". Mr. Wikstrom noted that this change may not be necessary given the change to 26(a)(2)(A), which clarified that disclosure deadlines are keyed off the "filing" of an answer, which is a known and quantifiable date. The committee agreed that this change is not necessary.

Mr. Wikstrom next entertained a motion to approve the rules as amended in the meeting, and to send the rules to the Supreme Court for approval. The motion was made and unanimously approved.

III. RULE 37.

Judge Shaughnessy led a discussion regarding an earlier-proposed amendment designed to limit the Court's resort to the serious, terminating-type sanctions, to circumstances that warrant such a result. Judge Shaughnessy ultimately recommended making a change to the committee note, giving practitioners and judges guidance as to what sanction would be appropriate under what circumstances, and to make certain that attorneys and parties generally understand that requests for terminating sanctions are not typically appropriate in cases of failure to disclose. A motion was made to approve and adopt the proposed committee note, as amended to state "limited those more drastic sanctions to circumstances in which a party fails to comply with a court order or persists in dilatory conduct, or acts in bad faith." The motion was approved unanimously.

IV. RULES 52, 59, 60.

Mr. Carney led a discussion regarding potential changes to the post-trial motion rules. First, should the names be updated to Judgment as a Matter of Law (JMOL) and Renewed JMOL. The phrases "directed verdict" and "judgment notwithstanding the verdict" (JNOV) are archane. Updated language would track the federal rules, which were changed to make it clear that the JMOL standard is essentially the same as the summary judgment standard. Second, the rules currently require an attorney to renew a JMOL at the close of the evidence, after the motion is originally made at close of other side's case. This can be a procedural trap for the unwary and seems to yield little benefit to the trial process. Third, should the time to file post-trial motions be changed from 10 days to 28 days? The committee debated the pros and cons of changing from 10 to 28 days. Mr. Davies noted the convenience of having the post-trial rules match the federal rules, both in terms of the standards and timing of motions. Last, should the rules be changed to refer consistently to the act of "filing", as opposed to the inconsistently used terms "move" or "made", etc. The committee agreed with the changes conceptually. Mr. Carney agreed to draft some proposed language implementing these changes for consideration at the next meeting.

V. RULE 58A.

Mr. Shea reported that the Appellate Rules Committee did not reach the 58A issue at their last meeting, though it was previously reported to this committee that it would consider a proposed change to Appellate Rule 4 at its next meeting. Mr. Wikstrom has communicated to the Appellate Rules Committee that this committee feels some urgency to address the issue as requested by the Supreme Court. Ms. Abegglen agreed to report this sentiment to the Appellate Rules Committee at their next meeting. If we are unable to effect the changes through the Appellate Rules, this committee will return to its discussion of potential revisions to Rule 58A.

VI. FAQ's.

Mr. Shea introduced for the committee's consideration some of the next proposed FAQ's. The first addresses expert discovery, specifically the timing of the election of report or deposition. The gist of this FAQ is that the 7 days is calculated by including the 3 extra days for mailing. Mr. Battle noted the concern the committee discussed at the last meeting, that parties are designating their experts early and thereby trying to force the other party into an early election. The committee earlier discussed and designed a FAQ to make clear that premature expert disclosures, *ie*, prior to completion of fact discovery, do not trigger an obligation to elect by the other side. The committee suggested either linking or merging the two FAQ's. Mr. Shea agreed to make an attempt at this and to present the results of this effort at the next meeting.

FAQ No. 2 addresses stipulations for extraordinary discovery. The committee engaged in extensive discussion regarding the response but, after reviewing the committee note to Rule 26, ultimately decided to strike the response in favor of the committee note. The proposed FAQ failed for lack of motion to approve.

VII. ADJOURNMENT.

The meeting adjourned at 5:58 pm. The next meeting will be held on January 23, 2013 at 4:00 p.m. at the Administrative Office of the Courts.

Happy Holidays and Best Wishes for the New Year!