

## MINUTES

### UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

MAY 22, 2013

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

TELEPHONE: Lori Woffinden, Honorable Lyle R. Anderson,  
David W. Scofield, Honorable Derek Pullan

STAFF: Tim Shea, Sammi Anderson, Diane Abegglen

EXCUSED: Professor Lincoln Davies

GUESTS: Chief Justice Matthew B. Durrant,  
Justice Thomas R. Lee, Troy Booher

#### **I. RECOGNITION OF MR. WIKSTROM'S INCREDIBLE SERVICE.**

Chief Justice Durrant attended and spoke to commemorate Mr. Wikstrom's 24, remarkable years of service on the committee -- 14 years of which Mr. Wikstrom served as Chair. Chief Justice Durrant noted that the discovery rules have improved the practice of law and made the Utah Bar a leader in the nation. The Chief also recognized Mr. Wikstrom's service to so many other important committees. Justice Lee also attended and expressed his own admiration for Mr. Wikstrom's professionalism, civility and leadership abilities.

Mr. Wikstrom took a moment to talk about the dedicated committee members who devote themselves so fully to improving the Rules of Civil Procedure and to express pride in the achievements of the committee. Mr. Wikstrom expressed appreciation for support from the Supreme Court, which support further energized the committee to try something innovative in rethinking the discovery rules. Mr. Wikstrom also expressed appreciation for support from the committee's staff, most notably Mr. Shea, who Mr. Wikstrom personally thanked. The committee expressed its general thanks and good wishes on Mr. Wikstrom's departure. Jonathan O. Hafen will serve as the new Chair of the committee.

#### **II. WELCOME TO JUDGE FURSE.**

Mr. Wikstrom welcomed the Honorable Eva Furse to the committee. Judge Furse serves as Magistrate Judge in the Utah federal district court. She replaces the Honorable Robert Shelby. The committee looks forward to working with Judge Furse. Additional changes to the committee membership include that Sammi Anderson will move from the Secretary position to full membership on the committee, and Nathan Whittaker will serve as the new Secretary.

### **III. APPROVAL OF MINUTES.**

Mr. Wikstrom entertained comments from the committee concerning the April 24, 2013 minutes. The committee unanimously approved the minutes.

### **IV. REVISIONS TO RULE 7.**

Judge Toomey led a discussion regarding importing into Rule 7 the expedited procedures governing discovery motions. Originally adopted as an interim rule, the procedures have since been moved into the Code of Judicial Conduct. Judge Toomey expressed anticipation that moving the procedure into Rule 7 would enhance the judiciary's and counsel's willingness to adhere to the new processes. Judge Toomey stated that feedback from the Bar and bench regarding the new procedures has been generally positive. The judges on the committee acknowledged that the parties' ability to adhere to the expedited discovery time frames will require expedited action on discovery disputes.

Mr. Slauch inquired as to how motions for sanctions will be addressed in light of the expedited process for resolving discovery disputes. Judges Toomey and Shaughnessy expressed their understanding that the intention was for motions for sanctions to be filed only where an expedited discovery order from the Court was disregarded or not followed.

Judge Furse raised two additional items warranting the committee's attention: 1) Whether an additional deadline should be added governing the filing of expedited discovery motions so that a ruling can be expected prior to the discovery cutoff?; and, 2) whether the committee should define the substance of "meet and confer," *ie*, meet in person, discuss by telephone, etc.? The committee considered that because the state rules are different from the federal rules in terms of the tight time frames already existing, no additional deadline is necessary. The committee discussed adding language to the rule or to the committee note, explaining that "confer" means discussion by telephone at a minimum, and that an in-person meeting is preferable. No consensus was reached.

The committee discussing whether the word "promptly" should be added to the expedited discovery rule, or whether a time frame should be included in the rule or comment to the rule. The judges on the committee opined that resolution on discovery motions appears to be happening within a few days following the conference with parties. Judge Shaughnessy also noted that occasionally disputes

are more complicated and require a series of hearings. The committee's conclusion was to add language to the committee note, stating that “promptly” means, in the ordinary course, within 7 days of a Notice to Submit. A motion was made for approval of Rule 7 as revised, with additional language for the comment to follow. So moved, seconded and approved.

**V. TROY BOOHER FROM THE APPELLATE RULES COMMITTEE REGARDING FINALITY ISSUES RAISED BY *Central Utah Water Conservancy District v. King*.**

Troy Booher, a member of the Supreme Court Advisory Committee on the Rules of Appellate Procedure, attended the meeting to discuss finality issues and the implications of *Central Utah Water*, a March 2013 decision by the Utah Supreme Court. Mr. Booher explained that Rule 54(a) defines “judgment” to mean any order from which an appeal lies. Under *Central Water*, the problem is there is no final judgment in place where post-trial motions have been filed and there is no Order denying the post-trial motions. But the rule governing post-trial motions presupposes entry of judgment – parties are required to post-trial motions within 10 days of judgment. *Central Water* seems to say that filing of post-trial motions negates a final judgment. Rule 58(a) also treats judgments different than orders; *Central Water* seems to conflate the two. Mr. Booher raised the issue of e-filing and queried whether the committees should now change the state rules to match the federal rules? *Central Water* also seems to change the *Gusti* test inasmuch as it requires the court to enter an order submitted under Rule 7.

Mr. Booher suggested that revisions to rules affecting finality and appeal will require a broad view. The implications will be significant and it will not be an easy fix. Mr. Booher suggested reviewing the 2002 federal committee notes to Federal Rule 58.

Judge Shaughnessy opined that, intuitively, it makes more sense that “finality” should be defined in the Appellate Rules. The Civil Rules should govern trial-level litigation. They should not be contorted to fit the small segment of cases that are appealed. Mr. Wikstrom explained that, originally, the state rules parted ways with the federal rules governing entry of judgment because while federal court clerks have the resources to enter the judgment themselves, state courts simply don’t have the same resources, making it imprudent to entrust entry of the judgment to state court clerks. There were also cost issues related to postage, but perhaps that could be resolved through e-filing.

Messrs. Booher and Shea discussed additional implications of problems from the Court's ruling. Judge Shaughnessy expressed that Rule 7 was never intended to carry the water *Central Utah* attributes to it. It is a mechanism to do the business of litigation.

Mr. Shea introduced discussion regarding amendments to Rule 7 that may help address these issues. The irony is that most people simply file successive notices of appeal to ensure that they are filing timely appeal notices where it is not clear whether different orders are really final judgments. The committee and Mr. Booher agreed the issues and related undertaking will be complex – there are mine fields everywhere. Mr. Carney suggested that a joint subcommittee from the committee and the Appellate Rules committee present the issues to the Court and seek guidance. Mr. Wikstrom suggested that a detailed presentation be made. Judge Furse noted the difficulty with ensuring that such a presentation does not happen simultaneously to the Court deciding a similar issue. Messrs. Battle and Slauch agreed to serve on the proposed subcommittee. The committee thanked Mr. Booher for attending and for his thoughtful discussion regarding the finality issues.

## **VI. PROPOSED REVISIONS TO RULE 7 AND RULE 58A.**

In light of the extensive discussion regarding finality and related appeal deadlines, Mr. Shea suggested removing any proposed revisions to Rules 7 and 58A that impact the finality issues. Those changes can be considered by the aforementioned subcommittee in the context of the overarching finality issues. The committee agreed. Changes to 58A(c) and 7(f) were tabled. The committee agreed to send for public comment previously approved changes to subpart (d) of Rule 58A, impacting notice requirements.

## **VII. PROPOSED REVISIONS TO RULE 7 REQUIREMENTS FOR MOTIONS AND MEMORANDUMS.**

Mr. Shea began a discussion of the proposed Rule 7 revisions governing the contents and requirements for motions and supporting memoranda. The committee expressed reluctance in considering action on extensive and substantive changes without the full committee present. Mr. Hafen expressed interest in further reviewing what the local federal court has done with revisions to the rules governing summary judgment briefing. The committee discussed at length whether to implement the change requiring a consolidated motion and memorandum now, along with the changes implementing the expedited discovery procedure, or to wait for a complete overhaul of Rule 7. The committee decided to table for further consideration and discussion any changes affecting Rule 7 motion practice, with the limited exception of revisions incorporating the procedure for expedited resolution of discovery disputes into Rule 7. The expedited resolution process should be sent for comment.

## **VIII. FREQUENTLY ASKED QUESTIONS.**

The committee approved Frequently Asked Question No. 1 regarding the 3-day mailing rule as written, except that it should be revised to say “only if the pleading or other paper” is served by mail.

**IX. SEPTEMBER 2013 MEETING.**

Mr. Hafen requested that September's meeting be moved up one week due to a prior conflict in his schedule. The next meeting will be moved to September 18, 2013. Time and place remain the same.

**X. REVISIONS TO RULES GOVERNING POST-TRIAL MOTIONS.**

Mr. Carney led a discussion regarding proposed revisions to the post-trial motion rules. Mr. Shea has proposed revisions to post-trial motions that match their federal counterparts. The committee expressed that the proposed revisions warrant further consideration and the proposed revisions were tabled.

**IX. ADJOURNMENT.**

The meeting adjourned at 5:52 pm. The next meeting will be held on September 18, 2013 at 4:00 p.m. at the Administrative Office of the Courts.

Mr. Wikstrom is again thanked for his lengthy and dedicated service to the committee.