MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

SEPTEMBER 18, 2013

PRESENT:	Jonathan Hafen, Chair, W. Cullen Battle, Scott S. Bell, Hon. James T. Blanch, Frank Carney, Prof. Lincoln Davies, Hon. Evelyn J. Furse, Steven Marsden, Terrie T. McIntosh, Hon. Derek Pullan, Hon. Todd M. Shaughnessy, Leslie W. Slaugh, Lori Woffinden
TELEPHONE:	Hon. Lyle R. Anderson, David H. Moore, David W. Scofield
STAFF:	Timothy M. Shea, Nathan Whittaker
EXCUSED:	Sammi V. Anderson, Hon. John L. Baxter, Trystan B. Smith, Hon. Kate Toomey, Barbara L. Townsend

I. INTRODUCTION AND WELCOME TO NEW MEMBERS

Mr. Hafen called the meeting to order as the new chair of the committee and welcomed Scott S. Bell and Nathan Whittaker to the committee. Mr. Bell is an attorney at the firm of Parsons Behle & Latimer practicing in commercial litigation. Mr. Bell replaces Fran Wikstrom. Mr. Whittaker is an attorney at the firm of Day Shell & Liljenquist practicing in civil and appellate litigation, and will be serving as secretary to the committee. Mr. Whittaker replaces Sammi Anderson, who was appointed to full membership on the committee, replacing Jan Smith. Members of the committee introduced themselves to the new members and look forward to working with them.

II. APPROVAL OF MINUTES

Mr. Hafen entertained comments from the committee concerning the May 22, 2013 minutes. The committee unanimously approved the minutes.

III. PUBLIC COMMENT ON PROPOSED REVISIONS TO RULES

Mr. Shea presented and summarized the public comments to the proposed revisions to Rules 7, 58A, 58B, and 64B, which were published on the Utah

Courts Website for public comment pursuant to UCJA 11-103 on July 11, 2013. The committee proceeded to consider the public comments and to determine whether to recommend each proposed revision to the Supreme Court as published, or whether to hold the proposed revision for further consideration.

A. Rule 7

Discussion. The committee proceeded to consider the proposed revision to Rule 7. Mr. Shea noted that he had made some stylistic changes to the proposed revision published for comment in response to comments made by Mr. Whittaker. These changes did not alter the substance of the proposed revisions. Mr. Shea explained that the bulk of the public comments dealt with the issues of the timeframe and page limits, which the committee had considered and discussed thoroughly before publishing the proposed revision.

Mr. Shea then highlighted a comment made at the recent District Judges' Conference that it would make more sense to incorporate the proposed revision into Rule 37 than in Rule 7. Judge Pullan, who had brought the comment to the committee's attention, agreed with the suggestion and noted that there was an amount of redundancy between the proposed revision and the existing Rule 37. Because of this, it may be more complicated than simply cutting and pasting the proposed revision into the existing rule. As the procedure in the proposed revision is already in effect under UCJA 4-502, Judge Pullan emphasized that there was no hurry to do this and that the committee should take its time and do a careful redrafting.

Judge Pullan's other concern was that the wording of the proposed revision does not make sense with respect to a motion to quash a subpoena or a motion for protective order. The proposed revision would require the moving party to include a statement regarding proportionality under Rule 26(b)(2). However, the point of a motion to quash or motion for protective order is that the discovery sought is not proportional, and the burden of establishing proportionality would be on the non-moving party.

Mr. Slaugh noted that provisions dealing with the form and content of motions were scattered throughout the rules, including Rule 101 for motions before a domestic relations commissioner and Rule 56 for summary judgment motions. He felt there was benefit in consolidating motion-related rules in Rule 7 rather than referring to multiple rules.

Mr. Davies noted that Rule 37 was where he would naturally look first for the rules regarding discovery disputes, and that to the extent that the procedure covered motions provided in Rules 45 and 26, there should be a cross-reference to Rule 37 in those rules.

Several other members felt that the same logic that supports moving the proposed revision to Rule 37 would support moving subparagraphs (A) & (B) of Rule 7(c)(3), which deal with the requirements for the statement of facts in a summary judgment motion, to Rule 56. They felt Rule 7 had become a catchall for anything motion-related, and it should be amended so that it addresses pleadings and motions generally, moving requirements for specific motions into the corresponding rules for those motions.

Mr. Hafen then asked the committee whether there were other changes that needed to be made to Rule 7. Judge Blanch conveyed several other judges' observations that litigants have had problems recognizing the importance of requests to submit under Rule 7(d). He suggested that it may be appropriate to intensify the language of 7(d) to emphasize that motions would not be submitted to the judge without filing a request to submit. Several members also raised concerns about submission of proposed orders, the separate motion and memorandum requirement, and the finality requirements.

Judge Furse expressed a concern that combining a motion and memorandum would lead to parties failing to state with particularity the relief requested at the beginning of the motion. Members agreed that the requirement of that statement must be emphasized. Judge Blanch encouraged borrowing from the local rules for the federal district court as much as possible in order to minimize the burden on litigants.

Judge Shaughnessy raised a concern with the filing of orders. In the current e-filing system, judges get orders in their queue without any explanation on whether they are stipulated, uncontested, disputed, *ex parte*, etc. For example, even if the order indicates that it is stipulated, because there is no cross-reference to the stipulation or joint motion, the judge must dig into the file to try to figure out if it was actually stipulated to and if it conforms to the stipulation. Judge Pullan agreed, and indicated that the issue was partly an e-filing issue and partly a rules issue. Judges want orders for *ex parte* motions like granting leave to file an overlength memorandum, but don't want orders to be submitted with substantive motions. Orders that are agreed to or stipulated to should be designated as such and should be approved as to form.

Mr. Shea noted that the committee had agreed in principle to this in a prior meeting, but as the committee was unable to come to consensus on the wording, the proposal was tabled for further consideration.

Mr. Marsden expressed concern that combining the motion and memorandum was clunky, particularly with respect to motions for summary judgment. It was noted that some other courts require separate motions and memoranda for motions brought under Rule 56, and several committee members indicated that the committee should discuss whether to except Rule 56 from the combined motion and memorandum requirement when the draft proposal is next discussed.

Committee Action. It was moved and seconded that further action on the proposed revisions to Rule 7 be tabled and that a draft be prepared for review that incorporates the proposed revisions into Rule 37, eliminates redundancies between the proposed revisions and the existing provisions of Rule 37, includes references to the procedure in Rules 7, 26 and 45, and clarifies that a motion for sanctions for failure to comply with a discovery order would be brought in the form prescribed by Rule 7 and not in the form for other discovery motions. The motion carried unanimously on voice vote.

It was further moved and seconded that the proposals with respect to Rule 7 be taken off the table and that a draft be prepared for review that incorporates the proposal to combine the motion and memorandum, the proposals for submission of orders, the proposal for the request to submit, and other proposals for Rule 7 previously identified. The motion carried unanimously on voice vote.

It was further moved and seconded that a draft be prepared for review that incorporates the existing language of Rule 7(c)(3)(A)–(B) into Rule 56. The motion carried unanimously on voice vote.

B. Rule 58A

Discussion. The committee proceeded to consider the proposed revision to Rule 58A, which was published for comment in tandem with a proposed revision to Rule 4 of the Utah Rules of Appellate Procedure. Mr. Shea noted that Mr. Whittaker had submitted comments to the proposed revision, and asked him to further explain.

Mr. Whittaker first expressed his concern that while the proposed revision would require "the party preparing the judgment" to serve notice of judgment to other parties, it did not address the situation of when the judgment was prepared by a Court. Mr. Battle noted that the intent of the proposed revision was to decouple service of the judgment from the issue of appellate jurisdiction. The question of who should serve a judgment prepared by the court is an altogether different question.

Mr. Whittaker next noted that the proposed revision required a party to "promptly serve" the notice, and expressed the concern that without a definite deadline for service, the question of whether a notice was promptly served so that the deadline for appeal cannot be reset would end up being a question of interpretation. Mr. Shea explained that the term "promptly" was chosen because a definite length of time would encourage the party responsible for serving notice to do so near the end of the allowed time. As the time for appeal runs from the date of judgment, the committee did not want to encourage that sort of gamesmanship.

Committee Action. Mr. Hafen asked for any proposed changes to the proposed revision before sending it to the Utah Supreme Court. As no changes were proposed, the proposed revision of Rule 58A as published for public comment was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on October 9, 2013.

C. Rule 58B

Discussion. The committee proceeded to consider the proposed revision to Rule 58B. Mr. Shea informed the committee that both comments were from district court clerks recommending that, rather than a judgment owner being required to file a satisfaction upon the request of the judgment debtor, it should be mandatory for the owner to file a satisfaction upon payment. Mr. Shea further noted that this suggestion was discussed in the past but was not adopted. Mr. Carney recalled that the suggestion was rejected because the committee anticipated resistance from the collection bar.

Judge Blanch noted that, while the prior rule did not require a satisfaction to be filed and that this would improve the situation of judgment debtors, the comments indicated that the committee did not do enough. He also expressed his concern that creditors who were previously filing satisfactions as a matter of course may see the proposed revision as a justification to ignore the rule

unless they heard from a debtor. It was also noted that, considering how difficult it is for debtors to get high-volume debt collection agencies to respond to them while their case was pending, it would likely be even more difficult to get in contact with those agencies after the debtors have paid the judgment to get them to file a satisfaction. After discussing the issue, it was the sense of the committee that it should be the responsibility of a creditor to file a satisfaction without being requested to do so by the debtor.

Mr. Marsden asked whether the committee had attached an enforcement mechanism to the requirement to file a satisfaction. It was noted that non-compliance with the rule would demonstrate wrongdoing and that the district court would have discretion to consider attorney fees and costs if the debtor was forced to bring a motion to declare the judgment satisfied.

Committee Action. It was moved and seconded that the words "at the request of the judgment debtor" on lines 4-5 and "after the request" on line 6 be deleted from the proposed revision to Rule 58B and that the proposed revision be resubmitted for public comment. The motion carried unanimously on voice vote.

D. Rule 64D

Discussion. The committee proceeded to consider the proposed revision to Rule 64D. Mr. Shea summarized the public comments as encouraging making continuing writs of garnishment effective for even longer, and expressing concerns as to how it affects interest. Mr. Slaugh suggested that the interest issue would be more effectively handled by effective drafting of judgments.

Committee Action. Mr. Hafen asked for any proposed changes to the proposed revision to the Utah Supreme Court. As no changes were proposed, the proposed revision of Rule 64B as published for public comment was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on October 9, 2013.

IV. HOW THE COMMITTEE SHOULD DO BUSINESS

Mr. Hafen led a discussion on how the committee should proceed with its business. He noted that the committee has done a lot of revisions to the civil procedure rules in the past few years, and there are a lot of proposals that are waiting for the committee's consideration. While there are some changes that are urgent—for example, correcting a mistake in a recent revision that would

lead to unintended consequences—other changes are only in the interest of general improvement. Mr. Hafen asked committee members to answer the question, "What is the role of this committee?"

Mr. Slaugh answered that it is the job of the committee to amend rules to stop gamesmanship and to prevent unintended consequences resulting from poor drafting or changes in circumstances, as well as to make substantive improvements to the rules in order to make procedures that are fairer and more efficient. The latter purpose must be done much more sparingly, however.

Judge Blanch recognized that while there is value in making the rules clearer, fairer, and more efficient, there is a countervailing value in predictability—practitioners should be able to have a set of rules that are up to date and that they can rely on, and we should allow the appellate courts to give binding interpretations of the rules before changing them. Our desire to make the rules as good as they can possibly be can lead us to disregard that value. Mr. Marsden added that predictability was important with respect to keeping down costs of litigation—having to constantly double-check previous forms and other papers to ensure they are compliant with the current rules costs time and money.

Judge Blanch also recognized the value in having our rules mirror the federal rules, as there is a much greater body of law interpreting federal rules. Utah appellate courts have recognized that decisions interpreting rules that are substantially identical to the Utah rules are strongly persuasive; when we depart from the language of the federal rules, we deny courts and practitioners the benefit of that body of case law. While sometimes there are good reasons for departing from the federal rule, it is not something we should do lightly.

Mr. Carney related his experience with attending a discussion about the Utah Rules of Civil Procedure with a group of Utah lawyers. He indicated that the people he talked to are frustrated at the inconsistency in application of the new rules, and seem to be aggravated at the changes generally. He noted that it was unclear how much of the frustration was based on there being something wrong with the rules and how much was based on the fact that the rules were a big change and people had not gotten used to them yet. He also noted that people he talked to liked the tier-one rule, but they did not like the rest of the changes. He had heard complaints from attorneys that certain

judges were not allowing parties to stipulate around the standard discovery procedures.

Judge Shaughnessy told the committee about two small cases that were before him recently. They exchanged initial disclosures but had done minimal discovery and neither side moved for summary judgment. They each had one- or two-day trials, and he ruled from the bench. He was convinced that the parties spent a lot less money litigating those cases than they would have under the old discovery rules. He also found it odd that people complain about the higher tiers and not tier one, as the procedure in a tier-three case is essentially the same as the procedures under the former rules. He also found it hard to believe that a judge would disallow discovery stipulations.

Judge Pullan pointed out that just like practitioners, judges are still learning about the new discovery procedures, and that there is bound to be inconsistencies in application. It is important to talk about these inconsistencies so that judges can be educated.

Mr. Hafen noted that the new discovery rules had been effective for nearly two years, and asked whether anyone in the committee would rather go back to the old rules. He talked about how nice it was to have limited deposition time and limits on discovery in his state cases, and how it contrasted with the federal cases where there were no limits. He mentioned how nice it was to be a "trial lawyer" rather than a "discovery lawyer." No one in the committee indicated that he or she would want to go back to the old rules.

Judge Pullan felt that one of the biggest improvements was how the new rules dealt with motions to compel—litigants were no longer tied up for months waiting for the motion to be decided.

Judge Furse related complaints she had heard about the requirement to exhaust discovery before requesting more. Without the guarantee of more discovery, the parties risk misallocating their allowed discovery, and this can lead to odd incentives in how parties conduct discovery.

Judge Shaughnessy expressed that one of the things litigants may still not fully appreciate is the presumption that untimely-disclosed evidence is excluded from trial. Mr. Marsden questioned whether the presumption is enforceable with respect to omitting a document or witness from initial disclosures but disclosing it well before the end of discovery. Judge Shaughnessy explained that if the disclosing party did not provide a good

reason for non-disclosure or did not show the other party was not prejudiced, the evidence would be excluded.

Mr. Hafen then asked Mr. Shea whether the committee has been more active in the past four years than it had been previously. Mr. Shea said that while there seems to be a perception that the committee is has been changing the rules more in recent years, the average is over the last ten years has been 12 rule changes per year. The average over the last four years has been 9 rule changes. Mr. Shea was quick to note that this statistic did not measure the scope of these changes, just the number of rules that were revised in a given year. Mr. Shea referred the committee to the portion of the Rule Amendment Summary he drafted that listed the pending proposals for amendment, and asked the committee to consider whether they were topics that needed to be considered. He reminded the committee that over the past few years, the committee has been seen as a legitimate avenue for practitioners to address problems with the existing rules. If the committee is no longer responsive to those concerns, they will bring up the problem with the legislature.

Judge Shaughnessy asked if the number of proposals originating from petitions from practitioners (as opposed to proposals originating from the committee) is lower than it used to be. Mr. Shea responded that almost every proposal aside from the 2011 discovery reform has come from outside requests, whether they come from practitioners, judges or administrators.

Judge Pullan pointed out that the 2011 discovery reform was a major shift not only in how law is practiced, but also in how we think about the civil litigation process. In going forward, we need to be sensitive to the "triple-bypass open-heart surgery" that the rules have just gone through. However, we must make sure that there is an open avenue for people to address problems—if we do not act, the legislature will.

Mr. Hafen then asked what the threshold is for taking action on a proposal as a committee—what kind of change is important enough for us to act on it? Judge Pullan replied that the committee must act to fix a rule that seriously prejudices parties due to gamesmanship. Mr. Carney added that the committee should act to fix a rule that is causing continuing conflict and litigation. Judge Blanch suggested that one way of determining the importance of an amendment is to present the proposal to the relevant groups and get feedback at the beginning of the process, rather than waiting until the comment period.

Mr. Davies made the analogy of regulated industries—if the regulators change the rules too much or too quickly, the regulated entities have a hard time keeping up and rule fatigue sets in. In this case, there must be some lag time to allow practitioners to catch up and get used to the changes. One way to allow this lag time is to amend less; another way is to publish rules for comment less frequently.

Mr. Hafen asked the committee how they felt about holding non-urgent proposed revisions so that they were only published for comment once a year. Judge Furse commented that the value of such a system would be diminished if the other committees did not follow suit. There would be value in having a predictable time when all of the amendments were published so that interested parties could set aside time to consider them, and it may encourage more people to comment. Judge Shaughnessy expressed his concern that bringing out a whole raft of small changes at once may be more disruptive than introducing those changes a few at a time.

Judge Blanch made the point that it may be wise upon looking at a new proposal to ask whether the change needs to happen at all, or whether the proposal is just not important enough to deal with and should just be thrown away. Mr. Slaugh suggested that rather than throwing the proposal away, an unimportant change could just be held until an actual important change to the rules is considered.

Mr. Carney noted that there were a lot of these fixes that were easy to deal with but would nonetheless be good value—that is, the time it would take to deal with the amendment and the amount of disruption would be small compared to the ambiguity and disputes the amendment would resolve. The committee should not avoid these types of amendments.

Judge Furse pointed out that the process for submitting a proposal for a rule change to the committee was not well publicized. The committee should try to inform practitioners about where to direct their concerns and proposals. More feedback from practitioners would allow the committee to judge what they perceive to be the problems the committee should be dealing with.

Mr. Carney made the point that the law evolves with the times and circumstances—we evolved from code pleading to notice pleading, and we are evolving from unlimited discovery to proportional discovery. The committee needs to keep up with that evolution.

Mr. Hafen summarized the discussion, noting that members seem to be generally satisfied with how the committee is doing business, and that the committee needs to focus on prioritizing issues and asking whether the proposed changes need to be made, and if so, when. He noted that the supreme court seems to be satisfied with the committee's work and rate of amendment.

Judge Pullan suggested that there would be merit in identifying questions or standards to judge the priority of proposals against. The questions would be based on the basic values of the committee. For example, does the amendment promote certainty? Other values that were mentioned were efficiency and neutrality. Mr. Hafen agreed with Judge Pullan's suggestion and asked committee members to come up with suggestions for this list of values.

V. ADJOURNMENT.

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