MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

FEBRUARY 26, 2014

PRESENT: Jonathan Hafen, Chair, Sammi V. Anderson, W. Cullen Battle, Hon. John L. Baxter, Scott S. Bell, Frank Carney, Hon. Evelyn J. Furse, Terrie T. McIntosh, Leslie W. Slaugh, Trystan B. Smith, Hon. Kate Toomey, Barbara L. Townsend, Lori Woffinden

TELEPHONE: Hon. Lyle R. Anderson, Hon. Derek Pullan, David W. Scofield

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Hon. James T. Blanch, Prof. Lincoln Davies, Steven Marsden, David H. Moore, Hon. Todd M. Shaughnessy

I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the January 22, 2014 minutes. Ms. Townsend noted that she was in attendance at January's meeting and asked that the minutes be amended to reflect that. The committee agreed to the amendment. It was moved and seconded to approve the minutes as amended. The motion carried unanimously on voice vote.

II. PUBLIC COMMENT ON PROPOSED REVISIONS TO RULES

Mr. Shea presented and summarized the public comments to the proposed revisions to Rules 6, 10, 58B, 74, and 75, which were published on the Utah Courts Website for public comment pursuant to UCJA 11-103 on November 26, 2013. The committee proceeded to consider the public comments and to determine final action on the proposed revisions.

A. Rule 6

The committee proceeded to consider the proposed revision to Rule 6. Mr. Shea summarized the public comments as raising the question of the definition of

mail under subdivision (c) and the changes to the number of days in specific rules to conform to the 7/14/21/28 day convention.

Three Days for Mail Rule. First, Mr. Shea brought up the "three days for mail" rule. Under the current rule, if a deadline is calculated by reference to a certain amount of time after serving a paper, three days are added to that deadline if the paper is served by mail. The proposed revision retains that provision. Mr. Shea noted that some comments had suggested that the term "mail" was ambiguous—one commenter asked whether email and e-filing were considered "mail" under the rule, and another commenter suggested that the rule should be restricted to U.S. mail in order to exclude delivery by commercial courier services such as FedEx and UPS.

Mr. Shea opined that he did not believe the term "mail" was particularly ambiguous and includes courier services and excludes email and e-filing. Nevertheless, if the committee wished to remove all doubt, Mr. Whittaker had proposed amending the rule to refer specifically to Rule 5(b)(1)(A)(iv), which provides that "a party shall serve a paper under this rule . . . by mailing it to the person's last known address." Mr. Slaugh agreed with Mr. Whittaker's amendment, and pointed out that it would also serve the function of clarifying that Rule 6(c) did not apply to service by certified mail under Rule 4. Members suggested retaining the words "by mail" along with the reference to the rule so that casual readers would not have to look up the cross-reference to understand the provision. The committee agreed with that suggestion and adopted the amendment.

Ten-Day Summons. Mr. Shea next directed the committee's attention to the changes in time for the procedures regarding a ten-day summons under Rules 3(a) and 4(c)(2). Currently, the rules allow for a complaint to be served on a defendant before filing with the court by means of a "ten-day" summons. The plaintiff has ten days after serving the defendant to file the complaint with the court. If the complaint is not filed within that amount of time, the defendant need not answer the complaint. The rule directs the defendant to contact the court "at least 13 days after service" to determine if the complaint has been filed.

Mr. Shea noted that under the convention adopted by the committee that periods of time that are 30 days or less should be changed to a multiple of seven, both the requirement to file within ten days after service and the direction to contact the court at least 13 days after service would be changed to 14 days. As

there needs to be a period of time between the deadline for filing the complaint and the time to check whether a complaint has been filed, one of the periods needs to be shorter than the other.

Compounding this problem is the 21-day time limit to file an answer after service. The purpose of the ten-day summons is to encourage a debtor to contact and reach a settlement with a creditor without incurring the expense of a filing fee. Thus, there must be adequate time to allow the parties to settle the claim before the complaint must be filed. At the same time, there must be adequate time to give the defendant notice that the complaint has been filed before it is required to file its answer, and adequate time between the two deadlines to allow the clerk's office to process the complaint. Given these constraints, the committee concluded that keeping the current periods of ten and 13 days would be appropriate.

Motion Practice Before Domestic Relations Commissioners. Mr. Shea next asked the committee to look at the comment addressing the time provisions of Rule 101. Rule 101 deals with the deadlines for submitting responses and replies in hearings before domestic relations commissioners. It currently provides that—

- a response to a motion must be served "at least 5 business days before the hearing;"
- a reply supporting a motion and a response to a countermotion must be served "at least 3 business days before the hearing;"
- a reply supporting a countermotion must be served "at least 2 business days before the hearing;" and
- a failure to serve appropriate attachments with a motion or response must be remedied "within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier."

The commenter noted that there was disagreement among the domestic relations commissioners as to whether the term "business day" meant that the filing had to be entered before 5:00 p.m. or midnight and recommended defining business days as ending at 5:00 p.m. Mr. Shea noted that the entire purpose of the proposed revision to Rule 6 was to eliminate the distinction between business days and calendar days and so recommended against adopting the commenter's proposal. However, because the periods of time in the rule were so short, he suggested stating the period in hours rather than days.

Members pointed out another problem with applying the "days are days" approach to this rule: when two deadlines are being calculated backward from one event and those two deadlines are less than four days apart, there is a good chance that those two deadlines can fall on the same day, meaning a response or reply would be due at the same time as the paper it was supposed to respond or reply to. This effect would occur under the proposed revision whether the time was expressed in days or hours.

Mr. Shea pointed out that there were proposed revisions in the family rules currently being examined by a family-law working group, and suggested that the committee exempt Rule 101 from the changes to Rule 6 for now and take the issue back up when the working group makes its recommendations. Because Rule 101 currently states time in "business days," the language would not need to be changed in order to exempt it from Rule 6. Several members suggested that if the committee exempted Rule 101, there should be an advisory committee note published stating as such, so readers would know that the committee's action was intentional. The committee agreed with both suggestions.

Other Items. While the committee was looking at changes in time periods under the rules, several members proposed extending the deadline to file a bill of costs under 54(d) to 14 days and extending the time to file post-judgment motions under Rules 50(b) & (c), 52(b), and 59(b), (d), & (e) to 28 days. While the committee generally agreed that these deadlines should probably be extended, it was the consensus of the committee that extending these deadlines would require sending the rule out for further comment. Moreover, as Mr. Carney had previously introduced a proposal revising all of these rules, these proposals could be included for consideration in Mr. Carney's proposal. Therefore, the committee tabled these proposals for further consideration concurrently with Mr. Carney's proposal.

Committee Action. It was moved and seconded that Rule 6 be revised as per the proposed revisions contained in pages 31–35 of the meeting materials, incorporating the following amendments:

- Line 93: after the word "mail," insert "under Rule 5(b)(1)(A)(iv)."
- Page 35: on the Deadline Changes Table, strike:
    - the change to Rule 3(a);

- both changes to Rule 4(c)(2); and
- the changes to Rule 101(c), (d), & (g).

- Add an advisory committee note after Rule 101 explaining the retention of the term "business days."

The motion carried unanimously on voice vote. The proposed revision of Rule 5 was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on March 26, 2014.

B. Rule 10

Discussion. The committee proceeded to consider public comments to the proposed revision to Rule 10. Mr. Shea explained that most of the comments with regard to this rule were objections to the provision that prohibited graphic signatures on the grounds that the provision would prohibit graphic signatures on documents such as affidavits and declarations. He further noted that while the prohibition of graphic signatures had only been intended to apply to pleadings and papers signed by the filer, the language of the provision swept broader than that. Mr. Shea pointed out that part of the proposed revision to Rule 5 deals with the question of filing documents signed by a person other than the filer and suggested that it would be better if the prohibition on the graphic signature of the filer should be enacted along with those provisions. The committee agreed with Mr. Shea's suggestion.

The committee then looked at the language to be restored in lines 44–45 of the proposed revision in the meeting materials. Mr. Shea pointed out that the original purpose of the revision had been to remove the reference to a graphic signature in order to help the clerks enforce the general requirement that papers be filed as native PDFs. Therefore, rather than just restoring the previous language, he suggested taking out the reference to graphic signatures entirely and ending the sentence after the word "signer." Members of the committee pointed out that without the reference to a graphic signature, the sentence was redundant with the previous sentence. The committee generally agreed that the sentence added nothing and so should be deleted in its entirety.

Committee Action. It was moved and seconded that Rule 10 be revised as per the proposed revisions contained in pages 36–39 of the meeting materials, incorporating the following amendment:

- Lines 44–45: delete the words "If a paper is electronically signed, the paper shall contain the typed or printed name of the signer with or without a graphic signature."

The motion carried unanimously on voice vote. The proposed revision of Rule 10 was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on March 26, 2014.

C. Rule 58B

The committee proceeded to consider public comments to the proposed revision to Rule 58B. One comment had suggested the 28-day deadline for filing a satisfaction was too short and suggested that it be extended to 90 days. The commenter argued that the timeline was too short and could "contribute to defendants fraudulently cancelling payments after a satisfaction is obtained." He added that "90 days would be a better outside deadline in order to allow for all payments to clear, communication between clients to occur, and then documents to be submitted to the court."

Members of the committee pointed out in response that a judgment cannot be said to be satisfied until the funds are actually received by the creditor. A judgment paid by personal check would not be satisfied until that check clears. Further, while a debtor could conceivably dispute a credit card payment after obtaining a satisfaction of judgment, a debtor is not entitled to a chargeback as of right, and there is more than adequate protections for the creditor in such a circumstance.

Mr. Slaugh pointed out that under Utah Code Ann. § 57-1-38(3), a lender must release its security interest on property within 90 days after the receipt of the final payment of a loan. He added that while he did not agree with the commenter, there was at least precedent for the 90-day period. Judge Anderson asked whether there was any substantial amount of communication that needed to take place between an attorney and client in order to determine whether a judgment is satisfied. Other members indicated that there was not. After discussing the issue, the committee concluded that requiring that a satisfaction be filed within 28 days of the judgment being satisfied was not unduly burdensome to creditors.

Committee Action. It was moved and seconded that Rule 58B be revised as per the proposed revisions contained in page 40 of the meeting materials. The motion carried unanimously on voice vote. The proposed revision of Rule 58B

was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on March 26, 2014.

D. Rules 74 & 75

The committee proceeded to consider public comments to the proposed revision to Rules 74 and 75. Mr. Shea directed the committee's attention to a comment that suggested that the phrase "if permitted by the judge" in the proposed revisions is ambiguous—the commenter suggested that it was not clear this phrase gave the district court discretion to deny withdrawal by oral notice or to deny withdrawal altogether. Mr. Shea noted that the purpose of the language was to give discretion to allow a volunteer lawyer who appears on behalf of a client for one hearing to withdraw at the end of that hearing, which would cut down on paperwork and facilitate pro bono representation. As the rule still allowed withdrawal by filing a notice of withdrawal, Mr. Shea did not believe that the provision was ambiguous.

Judge Pullan observed that the discretion is important to allow a judge to ensure that the *pro bono* client's case is handled fully. For example, the judge may want to require the volunteer lawyer to prepare an order before withdrawing. Having that discretion allows the judge to allow withdrawal by oral notice to be effective after the proposed order is submitted and approved. The committee concluded that no changes were needed.

Committee Action. It was moved and seconded that Rules 74 and 75 be revised as per the proposed revisions contained in pages 41–42 of the meeting materials. The motion carried unanimously on voice vote. The proposed revision of Rules 74 and 75 was thereby approved for presentation to the Supreme Court pursuant to UCJA 11-105(a) on March 26, 2014.

III. RULE 37

The committee next considered the proposed revision to Rule 37. A version of this proposed revision was previously approved for public comment at the November 20, 2013 meeting. However, after determining that there were too many items that were left unclear, the committee agreed to recall the proposed revision for further consideration.

Discussion. Mr. Shea explained the changes to the proposed revision made since the November meeting. As approved in the November meeting, the draft was amended as follows:

- the language stating that a response must "address the issues raised in the motion" was adopted in lieu of detailed instructions for the response;
- the provisions directing that disputes regarding nonparty discovery were to be heard by the court in the county where the nonparty was located were removed, and an advisory committee note explaining the removal was added;
- the draft was reordered so that the grounds for bringing an expedited discovery motion were in (a), while the procedure for bringing the motion was in (b); and
- the language of the draft was changed to clarify that expenses and attorney fees under (d) applied to an expedited motion, but sanctions under (e) were only available for failure to follow a court order.

After reviewing the draft, members of the committee raised the following concerns:

First, some members felt that the statement of grounds in subdivision (a) was not inclusive enough and suggested adding "catch-all" language to clarify that the expedited procedures apply to all discovery disputes.

Second, some members expressed a concern that the provision for expenses and attorney fees in subdivision (d) raised the stakes of the motion unacceptably high given the expedited and summary nature of the discovery procedure. Others responded that it is important that a judge has discretion to punish bad faith, dilatory and frivolous behavior. It was observed that subdivision (d) only allowed for expenses and attorney fees to the prevailing party "if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified." The suggestion was made to emphasize that requirement by adding the words "but only if" before the quoted language.

Third, some members noted that there was no language in subdivision (e) authorizing bringing a motion for sanctions for failure to comply with an order, and asked whether that language was necessary.

Fourth, some members were concerned that the prohibition on bringing a motion for sanctions in paragraph (b)(6) would prohibit a party from asking for sanctions in a circumstance where the opposing party did not violate an order and there is no cause to compel the party to submit to further discovery, but

rather acted in an outrageous and objectively unreasonable manner that would justify sanctions against that party.

Fifth, Mr. Battle observed that there were several references regarding compelling disclosures in Rule 37. He raised the concern that this confuses the issue of whether the Rule 26(d)(4) prohibition against using "the undisclosed witness, document or material at any hearing or trial" applied without first having to bring a motion to compel. Other members responded that in some circumstances where the party is required to disclose information that does not support its claims or defenses, the automatic exclusion is not an adequate remedy for the party's failure to comply.

Sixth, Mr. Battle also noted that subdivision (h) contained the following language that was missing from Rule 26(b)(4): "In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e)." He thought that to avoid confusion, 37(h) and 26(b)(4) should be substantively identical.

Seventh, some members added that it was unclear whether the automatic exclusion applied to a party who supplemented a disclosure without stating "why the additional or correct information was not previously provided" as required in Rule 26(d)(5), and if not, what a party needed to do to raise the issue.

Eighth, Some members expressed a concern regarding changing the name of the expedited discovery procedure from a "Statement of Discovery Issues" to a motion. They felt that the names "motion to compel," "motion for protective order" "motion for extraordinary discovery," "motion to quash subpoena," etc., were too associated with the pre-"statement of discovery issues" idea of motion practice and that it would be confusing, and that the language of Rule 37 should follow more closely the existing language in UCJA 4-502. Others responded that as the party making use of the expedited discovery procedures was applying to the court for relief, it was appropriate to call that application a motion. Further, the language in the UCJA that "the parties should [file and serve on all parties a statement of discovery issues] before filing with the court any discovery motion" caused confusion as to whether a motion to compel or for protective order had to be filed after the end of the statement of discovery issues process. Calling the expedited discovery procedures a motion would clarify that confusion.

Committee Action. It was moved and seconded that the proposed revision be tabled until the next meeting to allow a draft addressing these concerns to be

prepared for review, suggesting alternate language as appropriate. The motion carried unanimously on voice vote.

IV. ADJOURNMENT

The meeting adjourned at 6:03 p.m. The next meeting will be held on March 26, 2014 at 4:00 p.m. at the Administrative Office of the Courts.