MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

APRIL 30, 2014

PRESENT: Jonathan Hafen, Chair, W. Cullen Battle, Hon. John L. Baxter, Scott S. Bell, Hon. James T. Blanch, Steven Marsden, Terrie T. McIntosh, Leslie W. Slaugh, Trystan B. Smith, Hon. Kate Toomey, Barbara L. Townsend

TELEPHONE: Hon. Evelyn J. Furse, Hon. Derek Pullan, David W. Scofield, Hon. Todd M. Shaughnessy, Lori Woffinden

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Hon. Lyle R. Anderson, Sammi V. Anderson, Frank Carney, Prof. Lincoln Davies, David H. Moore

I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the March 26, 2014 minutes. It was moved and seconded to approve the minutes as drafted in the meeting materials. The motion carried unanimously on voice vote.

II. RULES 7, 54, & 58A

Discussion. Mr. Hafen next invited Mr. Battle to present the Final Judgment Rule Subcommittee's draft revisions of Rules 7(f), 54, and 58A (revisions to other subdivisions of Rule 7 were previously considered and approved by the committee). Mr. Battle summarized the major substantive changes as follows:

- Rule 7(f) (now Rule 7(j)) was revised to provide that an order signed by the judge is presumed to be complete unless there is an express direction for some further action. Express direction on the procedures for submitting proposed orders to the court and parties was also added.
- Rule 54 was revised to clarify and update the language and remove extraneous provisions.

- Rule 58A was revised to substantially adopt the process for entering final judgments in Rule 58 of the Federal Rules of Civil Procedure.
    - Except for the disposition of certain post-judgment motions, the proposal provides that all judgments must be set out in a separate document in order to be considered "entered" for purposes of determining when the time to appeal begins under Rule 4(a) of the Utah Rules of Appellate Procedure.
    - Because the state courts do not have adequate clerical staff to prepare judgments as separate documents as per the practice in federal courts, the proposal has been altered from the federal rule to require the prevailing party to prepare a proposed judgment. The procedures for serving, filing, approving, and objecting to proposed judgments would be the same as with proposed orders under rule 7.
    - If a court makes a final order but no separate order is entered, the time to appeal will not begin until 150 days has elapsed from the date that final order was entered.

Mr. Battle noted that there would likely need to be some explanatory notes drafted and volunteered to do so.

Judge Blanch stated that this would be a welcome change in the rules. He noted that one of the problems with the current procedure was that it makes no distinction between completeness with respect to disposing of a motion and finality for purposes of appeal. He gave the example of an order granting a motion for summary judgment—when the judge states that no further order is required, it is not clear whether the judge means that no further order is required to dispose of the motion or whether no further order is required to dispose of the action. There should be a way to tell not only when an action is finally disposed of, but also when the court believes the action is disposed of. Reversing the presumption with respect to non-final orders and requiring a separate document for a judgment accomplishes this.

Mr. Slaugh raised several points. First, he asked why the language in Rule 58A(b) (lines 21–23), which states that "unless the court prepares a judgment, the prevailing party must prepare and serve a proposed judgment," would not lead to the same result as was directed by the supreme court in *Code v. Utah Dept. of Health*, 2007 UT 43, 162 P.3d 1097, which is what he understood the committee was trying to get away from. He asked why it would not be suffi-

cient to just state that all signed orders were presumptively final. Mr. Marsden and Mr. Battle responded that the point of the separate document requirement was to give parties a clear indication of when an action is finally disposed of for the purposes of appeal. Just stating that an order was presumptively final would not provide adequate certainty. Members also noted that the proposal was different from the procedure in *Code* in several respects. The separate document requirement would not treat attorney-drafted judgments and court-drafted judgments differently—either the court or a party could prepare a judgment and both would have to conform to the same standards. The proposed rule would also not allow the court to skip the separate document requirement by invoking the "magic words" that no further order is necessary.

Mr. Slaugh next asked what the form of the separate judgment was supposed to take. While a simple money judgment may be set out in a separate document, a judgment or decree for equitable relief must be set out in detail. Is the separate document requirement just meant to refer to the relief granted in a separate document? Mr. Whittaker responded that the word "separate" in the separate document requirement refers to the judgment being separate from findings of fact and legal analysis. He referred the committee to *American Interinsurance Exchange v. Occidental Fire and Casualty Co.*, 835 F.2d 157 (7th Cir. 1987), which held that to meet the separate document requirement, a judgment must (1) be docketed as a separate document and not combined with or contained as part of another document; (2) contain ordering clauses stating the relief to which the prevailing party is entitled, and not merely refer to orders made in other documents; and (3) substantially omit recitation of facts, procedural history, and legal analysis. He added that a divorce decree is a good example of how to properly draft a judgment for equitable relief—in all cases there are written findings of fact and conclusions of law and a separate decree containing only ordering clauses.

Finally, Mr. Slaugh asked what would happen if no one drafts a final judgment. Members responded that the proposed revision to Rule 58A provides that if a final order has been made but no separate judgment has been entered, the judgment becomes final for purposes of appeal 150 days after the final order was made.

Judge Shaughnessy and Judge Blanch mentioned that they had spoken with one of Judge Shaughnessy's clerks, who told them that because the Courts Information System (CORIS) requires an action to close a case, it would be a simple matter for the district court to electronically generate a notice that the

case was closed similar to the automatically generated notice of discovery dates. The committee was of the opinion that the idea had promise and should be explored further, but between the separate document requirement and the requirement in 58A for the prevailing party to serve a notice of the entry of judgment on other parties, there was adequate notice of finality for the time being.

Mr. Marsden raised a concern about Rule 58A(b) (lines 21–23), which provides that "a party must prepare and serve a proposed judgment . . . in the same manner as a proposed order under Rule 7(j)." Because Rule 7(j)(1) provides for preparation of a proposed non-final order, just incorporating all of 7(j) might lead to confusion. The committee generally agreed to change the reference to 7(j)(2).

Ms. Townsend noted that the requirement to draft a proposed order within 14 days had been removed from the draft of Rule 7(j). She said that clients often call the state bar complaining that their attorneys have not prepared a proposed order, and it is easier for the bar in responding to those complaints to refer to the deadline set in the rule. Some members pointed out that sometimes the parties trade draft orders back and forth in trying to reach agreement as to the language of an order; this process may last longer than 14 days. Others responded that the only consequence of not serving a proposed order within the 14-day deadline is merely that another party can prepare and serve a proposed order instead of the party assigned to do it. The committee generally agreed that the 14-day deadline should be restored to Rule 7(j).

Mr. Whittaker asked the committee to look at Rule 58A(a) (lines 13–20), which provides that every judgment must be set out in a separate document except for "an order disposing of" certain post-judgment motions. He noted that an order disposing of a post-judgment motion will either (1) grant the motion and order further proceedings, (2) grant the motion and amend the judgment, or (3) deny the motion. Option 1 is not a final judgment, and an amended judgment under option 2 should really be set out in a separate document, as noted by the 2002 Federal Advisory Committee Notes ("If disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document."). Therefore, only a denial of a post-judgment motion should be a final judgment exempt from the separate document requirement, and Mr. Whittaker suggested that the word "disposing" in line 15 be replaced by the word "denying." The committee generally agreed with this suggestion.

Judge Pullan observed that under Utah law, a judgment is not final for purposes of appeal until the question of attorney fees has been disposed of. *Pro-Max Development Corp. v. Raile*, 2000 UT 4, ¶ 15, 998 P.2d 254. A "judgment" that did not address attorney fees would be non-final by definition, even if it was set out on a separate document. With that in mind, he asked whether it was proper to include a motion for attorney fees in the list of post-judgment motions that did not require a separate document. Mr. Whittaker responded that while that was true, if a judgment had already been entered on a separate document before the issue of attorney fees had been disposed of, it would probably be better in terms of providing certainty to treat the motion for attorney fees as a post-judgment proceeding. He also mentioned that if the committee wanted to develop a comprehensive solution to the problem, it could look at adopting a version of Federal Rule 54(d)(2), which requires that a motion for attorney fees be brought within 14 days of the entry of judgment. The committee was generally of the opinion to leave (a)(5) as it was for now.

Mr. Shea directed the committee's attention to Rule 7(j)(1)(B) (lines 101–102) and suggested that the words "memorialized in writing" be deleted in order to conform to the language in 7(j)(1)(A). The committee generally agreed with Mr. Shea's suggestion.

Committee Action. It was moved and seconded that Rules 7, 54, and 58A be revised as proposed in the proposed revision contained in the meeting materials, incorporating the following amendments:

- Rule 7, Line 101: delete the words "memorialized in writing"
- Rule 7, Line 106: insert the words "within 14 days" between "shall" and "prepare"
- Rule 58A, Line 15: replace "disposing" with "denying"
- Rule 58A, Line 23: replace "7(j)" with "7(j)(2)"

The motion carried unanimously on voice vote. The proposed revisions to Rules 7, 54, and 58A were thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

III. REPORT FROM CASE MANAGEMENT SUBCOMMITTEE

Mr. Hafen next asked Judge Pullan to provide an update on the work of the Case Management Subcommittee, which was established at the meeting of

March 26, 2014. Judge Pullan referred the committee to the draft proposal in the meeting materials, which was drafted by Mr. Shea. He said that he had not had a chance to submit his revisions to the proposal yet, as he had just taken on a new caseload.

Judge Toomey asked whether there was a proposed start date for the pilot program. Judge Pullan responded that no date had yet been chosen. Judge Toomey suggested that the program begin on July 1st, as it was the beginning of the fiscal year. The committee generally agreed that July 1st would be a good starting date for the pilot program.

Mr. Marsden mentioned that he had attended the spring meeting for the Business Law Section of the American Bar Association. One of the presentations he saw at this meeting dealt with case management and involved a panel of judges from around the country. He said he would be happy to share the meeting materials from this presentation if it would be of interest to the subcommittee. Mr. Hafen responded that this sounded like interesting and valuable content and encouraged Mr. Marsden to forward the information to the subcommittee.

Mr. Smith suggested that the pilot program should focus on those categories of cases within Tier 3 (such as personal injury, medical malpractice, and products liability) that the survey data showed had the longest time to disposition. Judge Pullan agreed that the type of case should definitely inform decisions about complexity, but he thought that at least for purposes of the pilot program, all Tier 3 cases should at least have an initial case management conference. Because the number of Tier 3 cases is relatively small, it would not be unduly burdensome to have the parties appear at least once; if the case at issue is not that complex and does not require much management, that will be apparent at the conference. For purposes of getting uniform data among the judges who will be participating in the pilot program, it was important to have a clear criterion about which cases would be subject to at least an initial conference.

Mr. Hafen asked Judge Pullan whether, since the proposal needed to be presented to the supreme court before the committee's next meeting on the morning of May 28th, the bullet points of the proposal could not be submitted to committee members by email within a couple of weeks' time for review and comment. Judge Pullan thought the plan would be feasible. The committee generally agreed to move forward with the proposal in that manner.

Judge Pullan also informed the committee that Judge Kay from the Second District had expressed an interest in helping the subcommittee with the project and asked whether there was any objection to adding Judge Kay to the subcommittee. No objections were raised, and Judge Kay was added to the case management subcommittee.

IV. RULES 26 AND 45

Discussion. Mr. Hafen next invited Mr. Shea to present proposed revisions to Rules 26 and 45. Mr. Shea explained that the proposed revisions were changes to the references to discovery motions in the text and comments of the rules. As discovery motions in Rule 37 have been changed to statements of discovery issues, the references to discovery motions in other rules need to be changed as well.

Mr. Slaugh noted that in Rule 37(a), the procedure for obtaining an order regarding discovery was referred to as an "expedited statement of discovery issues" in the heading of the rule and as a "statement of discovery issues" in the body of the rule. He suggested that the name for the procedure be consistent, and stated his preference for the shorter term "statement of discovery issues." Several other members agreed that the word "expedited" was unnecessary. Mr. Hafen said that he liked having the word "expedited" in the heading as it emphasized the nature of the procedure. Mr. Shea suggested deleting the word "expedited" from the proposed revisions to Rules 26 and 45, and that when the comment period for Rule 37 is over, the committee consider deleting the word "expedited" from that rule at that time.

Committee Action. It was moved and seconded that Rules 26 and 45 be revised as proposed in the proposed revision contained in the meeting materials, incorporating the following amendments:

- Rule 26, Lines 530, 532, & 556–57: in each instance, replace "an expedited statement" with "a statement"
- Rule 45, Line 168: remove the word "expedited"

The motion carried unanimously on voice vote. The proposed revisions to Rules 26 and 45 were thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

V. RULE 56

Discussion. Mr. Hafen next invited Mr. Shea to present the proposed revision to Rule 56. Mr. Shea explained that the draft revision in the meeting materials was essentially the federal rule with the substance of current Rule 7(c)(3) added as the committee had previously recommended.

Mr. Whittaker indicated that he had a number of suggestions for amendments. Mr. Hafen invited him to present them to the committee. First, Mr. Whittaker suggested changing "must" to "shall" on line 4 to be consistent with the federal rule for the reasons explained in the 2010 Advisory Committee Notes in the federal rule. The committee generally agreed to the change.

Mr. Whittaker next pointed out that line 5 replaces the old language of "if the pleadings, the discovery and disclosure materials on file, and any affidavits show" with "if the moving party shows." He asked the committee whether, given the Utah Supreme Court's rejection of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), one of these lines better expressed the standard required by a moving party than the other. The committee was generally of the opinion that the new language was consistent with Utah law.

Mr. Whittaker suggested adding the words "unless the court orders otherwise" to line 25 to be consistent with the federal rule. Mr. Shea agreed and said that it looked like it was just a typo on his part. The committee generally agreed to the change.

Mr. Whittaker suggested restoring the requirement that a motion for summary judgment could not be filed until at least 20 days after the commencement of the action. He noted that the federal rule had deleted this requirement, stating in the 2009 Advisory Committee Notes that "the new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action." As the time for response to a motion in Rule 7 is 14 days, this could lead to a scenario in which a party would be required to respond to a motion before summary judgment before it was required to file an answer. Judge Shaughnessy suggested changing 20 days to "21 days," as well as changing the 30-day deadline on line 26 to "28 days," to be consistent with the other deadlines of 30 days or less. The committee agreed to the changes with Judge Shaughnessy's amendments.

Finally, Mr. Whittaker suggested deleting lines 34–36, as it appeared they explicitly adopted the standards of *Celotex*. Judge Shaughnessy replied that the

first half of the sentence in question was consistent with Utah law; only the second half of the sentence adopted *Celotex*. He suggested deleting the rest of the sentence after the word "dispute" in line 35. Mr. Whittaker endorsed that amendment to his suggestion and the committee generally agreed to the change.

Mr. Smith asked the committee to look at paragraph (a)(2) (lines 16–18), which allows a nonmoving party to include in its response memorandum a "separate statement of additional facts in dispute," which corresponds to language in the current Rule 7(c)(3)(B). Mr. Smith noted that some practitioners had taken this provision to require all additional facts in dispute rather than just ones that were material to the motion. He suggested making it clear that the separate statement should be of "additional ***material*** facts in dispute." The committee generally agreed to the change.

Judge Pullan raised a concern about paragraph (a)(3) (lines 19–22), which allows a party to include in its motion or memorandum "a concise statement of facts and allegations for the limited purpose of providing background and context for the case, dispute, and motion." He worried that this provision would lead to situations where the key facts for the motion were contained in the statement of background facts. Mr. Slaugh responded that allowing the parties to put background facts in a separate statement where it was clear that they were not viewed as material facts and did not need to be rigorously supported by record evidence, it would reduce the length and complexity of summary judgment motions. Judge Blanch agreed and argued that this provision was necessary to prevent the practice of a movant's filing of banker's boxes full of evidence in order to support every conceivable fact, whether material to the motion or not, and of a nonmovant's disputation of every single fact, whether material or not. He added that the provision reflects what practitioners were doing in their motions in various different ways—adding the provision would provide uniformity in how the motions would be formatted. He suggested that the solution to Judge Pullan's hypothetical would just be to deny the motion for failure to follow the rule. Judge Furse noted that a nonmovant arguing that a fact listed in the background section is actually material is substantively identical to a nonmovant identifying an additional disputed material fact not mentioned in the motion, which is a common scenario currently provided for under Rule 7(c)(3)(B).

Mr. Battle pointed out an additional problem caused by loading up the statement of undisputed facts with background facts: paragraph (a)(4) provides that

each fact that is set forth that is not disputed is deemed admitted for purposes of the motion, and subdivision (g) allows a court to declare facts as established in the case. This provides an incentive for a nonmovant to dispute facts whether or not they are material.

Mr. Shea noted that paragraph (a)(3) was based on Rule 56-1(b) of the District of Utah Local Civil Rules of Practice, which states:

> The motion may, but need not, include a separate background section that contains a concise statement of facts, whether disputed or not, for the limited purpose of providing background and context for the case, dispute, and motion. This section may follow the introduction and may, but need not, cite to evidentiary support.

Mr. Bell suggested taking out the last sentence in the paragraph, which allows a party to cite evidence in support of the background facts. Judge Shaughnessy agreed and said that removing it would not prohibit citing evidence, but taking it out would de-emphasize the perceived need for citing evidence. Judge Shaughnessy also suggested adding the clause "whether disputed or undisputed" after the phrase "statement of facts and allegations." He said that adding that clause would communicate that the background facts may be disputed and that there was no need to contest the facts with the same degree of rigor as facts contained in the material facts section. The committee generally agreed to these changes.

Mr. Shea suggested adding the phrase "other than in the background section" after the phrase "opposing the motion" in lines 23–24. The committee agreed that the change would be consistent with the purpose of a separate background section.

Mr. Smith suggested changing the deadline for filing a motion for summary judgment from 28 days after the close of discovery to a certain number of days before trial. He argued that there are legal issues on the eve of trial that are better addressed as a motion for partial summary judgment, and the rule should allow for those types of motions. Judge Blanch responded that if the date for filing the motion is too close to trial, the time for briefing and oral argument would necessitate a continuance of the trial in most cases. Mr. Whittaker pointed out that this would be a default rule, and that the addition of the words "unless the court orders otherwise" make it clear that the judge has the authority to hear motions for summary judgment that are beyond the default deadline. The type of motion that Mr. Smith raises would be one the court may

consider hearing along with motions in limine, but it may be best left up to the court's discretion. The committee generally agreed to leave the deadline as 28 days after the close of all discovery.

Committee Action. It was moved and seconded that Rule 56 be revised as proposed in the proposed revision contained in the meeting materials, incorporating the following amendments:

- Line 4: remove the underlined word "must" and restore the word "shall"
- Line 17: insert the word "material" between the words "additional" and "facts"
- Line 20: after the words "concise statement of facts and allegations" insert the underlined text as follows: "concise statement of facts and allegations, whether disputed or undisputed, for the limited purpose"
- Lines 20–21: delete the sentence "The statement of facts or allegations may cite supporting evidence."
- Line 24: insert the phrase "other than in the background section" between the words "motion" and "that is not disputed"
- Line 25: insert the clause "Unless the court orders otherwise," before the words "a party may file"
- Line 26: insert the phrase "after 21 days have passed from commencement of the action" after the words "at any time"
- Line 26: replace "30" with "28"
- Lines 35–36: delete the clause "or that an adverse party cannot produce admissible evidence to support the fact"

The motion carried unanimously on voice vote. The proposed revision to Rule 56 was thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

VI. ADJOURNMENT

The meeting was adjourned at 6:02 p.m. The next meeting will be held on May 28, 2014 at 4:00 p.m. at the Administrative Office of the Courts.