

## **Minutes**

### **Advisory Committee on the Rules of Civil Procedure**

September 23, 2015

**Present:** John Baxter, Lincoln Davies, Evelyn Furse, Jonathan Hafen, Presiding, Kent Holmberg, James Hunnicutt, Steven Marsden, Terrie McIntosh, Amber Mettler, Leslie Slaugh, Trystan Smith, Paul Stancil, Kate Toomey, Lori Woffinden

**Excused:** Lyle Anderson, Sammi Anderson, Rod Andreason, James Blanch, Derek Pullan, Barbara Townsend, Heather Sneddon

**Staff:** Tim Shea

**Guests:** Lane Gleave, Tyler Gleave

#### **(1) APPROVAL OF MINUTES.**

The minutes of May 27, 2015 were approved as prepared.

#### **(2) INTRODUCTION OF MEMBERS**

The members of the committee introduced themselves. Mr. Hafen reviewed the principles the committee applies when considering rule changes.

#### **(3) CONSIDERATION OF COMMENTS**

The committee considered comments to the following rules:

- Rule 6. Time.
- Rule 8. General rules of pleadings.
- Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.
- Rule 50. Judgment as a matter of law in a jury trial; related motion for a new trial; conditional ruling.
- Rule 52. Findings and conclusions by the court; amended findings; waiver of findings and conclusions; correction of the record; judgment on partial findings.
- Rule 59. New trial; altering or amending a judgment.
- Rule 60. Relief from judgment or order.
- Rule 63. Disability or disqualification of a judge.

Mr. Shea said that he had already included the suggested changes to grammar and style. The committee initiated a few further grammar and style changes, but decided against the clarifications suggested by the commentators. The committee approved recommending the rules, as further amended, to the supreme court for approval.

**(4) RULE 41. DISMISSAL OF ACTIONS**

Mr. Shea said that the amendments to Rule 41 should have been published with the previous group because the primary amendment is to remove a provision from paragraph (b) that has been moved to Rule 52(e). He also pointed out two changes that would align the rule with its federal counterpart: a stipulated dismissal would no longer need court approval; and plaintiff would be able to voluntarily dismiss before an answer or motion for summary judgment, rather than before an answer or other response to the complaint. The committee discussed whether a motion for summary judgment is an appropriate reference point under the state rules, and decided that it is. The committee approved the amendments to be published for comment.

**(5) RULE 4. PROCESS**

Mr. Marsden, Mr. Holmgren and Judge Blanch volunteered to examine the issue referred to the committee in *St. Jeor v. Kerr Corporation* and report their recommendations to the committee in November. Mr. Marsden will chair the workgroup.

Mr. Shea reviewed the committee's discussions regarding the proposal to allow service of process under Rule 4 by electronic means. Mr. Gleave's e-service application was demonstrated in January and further discussed May. Mr. Shea was tasked with developing amendments to Rule 4 around the concepts discussed without tying the concepts to any particular application. Mr. Shea said that in his opinion service by mail, waiver of service and Mr. Gleave's application all relied on the same principle: an act by the defendant that indicates acceptance of service and a receipt, ultimately filed with the court, assuring the court that the defendant had actually been served.

Mr. Shea recommends that service by mail and waiver of service be eliminated. Instead the rule should provide for acceptance of service. Delivery of the complaint and summons could be by Mr. Gleave's application or it could be by first class mail—as is currently permitted for waiver of service—by email or by any other method. The complaint and summons would be accompanied by an appropriate form describing the action and the consequences of accepting and not accepting service. The defendant would be asked to complete and return the form indicating acceptance, which the plaintiff would file.

Mr. Slauch said that he agrees with the concept, but pursuing acceptance should not be required. Others agreed that pursuing acceptance of service should be optional. There are circumstances when service needs to be immediate, and the plaintiff should be permitted to have the complaint and summons personally served without first requesting that the defendant accept service. Mr. Shea will make that change. He asked whether the committee was nevertheless comfortable with imposing on all parties the obligation to avoid unnecessary expense in service of process. The federal rule imposes

that obligation only on the defendant. The committee agreed that all parties should avoid unnecessary expenses, but the expense of personal service is sometimes necessary.

Mr. Marsden said that under the federal provision for waiver of service, the plaintiff can recover the cost of personal service after refusal to waive even if the plaintiff does not prevail on the case. Mr. Shea will include a similar provision in the next draft.

Ms. Woffinden said that the date from which to calculate the answer due date is too uncertain. The committee agreed that the date from which to calculate the answer due date should be the date the defendant indicates signature, but only if the plaintiff files the form with the court.

The committee agreed in concept to pursue this course of action. Mr. Shea will draft further amendments keeping with the conclusions thus far, and he will draft a suitable form. Mr. Shea said that the rule is also being amended to require that the proof of service include a copy of the summons.

#### **(6) RULES 9, 26.2 AND 58C**

Mr. Shea said that the committee had discussed these amendments in the spring. Rule 9(k) is being deleted because it does not conform to the Judgment Renewal Act, and Rule 26.2 requires a conforming amendment. The committee had asked for a rule describing the process for a motion to renew a judgment even though the statute already describes a process. Litigants should be able to look to the rules for answers to questions about process, and, if the act is declared unconstitutional because the legislature did not follow constitutionally required procedures in adopting it, the rule will nevertheless govern.

Mr. Shea proposes a new rule, Rule 58C. Mr. Slauch suggested deleting proposed paragraph (c), which would allow the judge to require service personal service. The act permits sending the motion to the debtor's last known address. The court already has personal jurisdiction, so service under Rule 4 is not needed. Mr. Shea said that Judge Anderson had requested this discretion, not to give the court jurisdiction, but to be assured that the debtor had actual notice. After discussion the committee decided to delete paragraph (c) and change paragraph (b) to require that the motion be sent to the debtor's last known address. The affidavit supporting the motion will include a description of the creditor's efforts to find the debtor's correct address.

After discussion, the committee decided to retain the provision requiring that the motion include a copy of the judgment being renewed.

Mr. Shea will draft the further changes and present them to the committee.

**(7) RULE 26.1**

Mr. Slaugh recommends that the deadline for making disclosures in family law cases be the same as in other civil litigation. Mr. Hunnicutt agreed and said that this is the current practice. The committee approved the amendments to be published for comment.

**(8) EXAMINATION OF 2015 AMENDMENTS TO THE CIVIL RULES**

Professor Stancil, Professor Davies, Mr. Hunnicutt and Judge Furse volunteered to review the 2015 amendments to the federal rules of civil procedure and report their recommendations to the committee in November. Professor Stancil will chair the workgroup.

**(9) FUTURE MEETINGS**

In addition to the regular meeting schedule, the committee decided to meet on December 16, 2015 and June 22, 2016.

**(10) ADJOURNMENT**

The remaining matters were deferred, and the committee adjourned at 6:00.