

Minutes

Advisory Committee on the Rules of Civil Procedure

February 25, 2015

Present: Sammi Anderson, John Baxter, Scott Bell, James Blanch, Evelyn Furse, Jonathan Hafen, Presiding, Steven Marsden, Terrie McIntosh, Amber Mettler, David Scofield, Todd Shaughnessy, Leslie Slaugh, Paul Stancil, Kate Toomey,

Excused: Rod Andreason, Lincoln Davies, Trystan Smith, Heather Sneddon, Barbara Townsend. Due to a failure of the telephone conferencing system, Lyle Anderson, Derek Pullan and Lori Woffinden were also excused.

Staff: Tim Shea

(1) APPROVAL OF MINUTES.

The minutes of January 28, 2015 were approved as prepared.

(2) CONFERENCE COMMITTEE TO CONSIDER EFFECT OF POST-TRIAL PROCEEDINGS ON APPEALABILITY OF A JUDGMENT.

Mr. Hafen reported that the Supreme Court has requested that this committee and the Committee on the Rules of Appellate Procedure form a conference committee to consider, in light of the federal rules, the effect of post-trial proceedings on the appealability of a judgment. Paul Burke and Alan Mouritsen from the appellate committee and Rod Andreason and Amber Mettler from this committee have agreed to serve. Mr. Shea will staff the conference committee.

(3) CONSIDERATION OF COMMENTS TO RULE 7, RULE 54, RULE 56 AND RULE 58A.

Mr. Shea reported that he had already made many of the grammar and style changes suggested by Mr. Whittaker.

Rule 7. The committee made the following further changes:

- ¶(b)(1): The commissioners follow Rule 37(a) on discovery disputes, so (b)(2), (b)(3) and (b)(4) are referenced as exceptions.
- ¶(c)(3), (d)(3) and (e)(3): Initial motions and memorandums are limited to 25 pages if the motion is for relief under Rules 12(b), 12(c), 56 or 65A. Otherwise, initial motions and memorandums are limited to 15 pages. Reply memos have 15- and 10-page limits, respectively. Judge Toomey and Judge Shaughnessy opposed the increase.
- ¶(f): Limit the response to 3 pages. After considerable discussion, the committee decided not to add a process for objecting to new evidence in the reply memo and responding to that objection.
- ¶(g): The text governing a request to submit for decision was simplified.
- ¶(i): Remove the phrase “without argument” and impose a one-page page limit. The further change is modeled after URAP 24(j).
- ¶(j)(6)(B): Add a motion that can be acted on without waiting for a response.
- ¶(j)(7): Add a motion that can be acted on without waiting for a response
- ¶(l): New. Add the requirements for a motion that can be acted on without waiting for a response. Develop a list of motions that qualify. Mr. Bell will submit some suggestions.
- ¶(k)(4) and (m)(4): Add requirement for a request to submit for decision, since the motion may not be routed to the judge without one.

After discussion the committee decided not to:

- remove the last two sentences of the committee note as suggested by Mr. Whitaker;
- add “petition” to the list of permitted pleadings as suggested by Mr. Richens.

Rule 54.

The committee decided not to recommend any further changes. Mr. Whittaker’s observation that paragraphs (a) and (b) may contradict each other turned out, on further analysis, not to be the case. The committee would like the joint subcommittee of our committee and the appellate rules committee to consider a mechanism for including attorney fees, costs and interest in the judgment. The current paragraph (e) is appropriately deleted because the procedures described are not being followed. There is no intent to prohibit attorney fees, costs and interest from the judgment. The only intent is to remove an out dated mechanism.

Rule 56.

The committee decided not to recommend any further changes. Mr. Pattison argues that the option to deny a motion for summary judgment when facts are unavailable to the non-moving party is improper and not supported by current state law. The committee concluded that the proposed rule using the federal language (“defer considering the motion or deny it”) is the equivalent of the current state rule (“the court may refuse the application for judgment or may order a continuance”).

Rule 58A.

The committee decided not to recommend any further changes.

The committee approved Rule 54, 56 and 58A, and decided that they should not be submitted to the Supreme Court until Rule 7 is also ready.

(4) SMALL CLAIMS RULE 14. SETTLEMENT OFFERS.

The committee considered this proposal last year, but decided against it. Upon reconsideration the committee believes the proposal is too complex and therefore inappropriate for small claims proceedings. The committee again decided not to recommend the proposed rule.

(5) RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

Mr. Shea reported that the Supreme Court has asked the committee to reconsider its recommendations regarding service by fax and service by email without the prior agreement of the person being served. The committee continues to feel that service by fax is out dated, but agreed that the parties should be able to agree among themselves to a method of service other than those permitted by rule. The committee approved a new paragraph (b)(3)(G) allowing service by “any other method agreed to in writing by the parties.”

The committee discussed whether to require the agreement of the person being served before service could be by email. After considering the alternatives, the committee continues to recommend that service by email be permitted without prior agreement. Email is simple, inexpensive and a common feature of everyday professional life. Although most attorneys would probably agree to service by email, the task of obtaining an agreement adds an unnecessary expense, and those who do not agree impose a significant cost on opposing counsel.

The committee approved the draft rule with the further change. Mr. Hafen will present the committee’s recommendations to the Supreme Court.

(6) RULE 11. SIGNING OF PLEADINGS, MOTIONS, AFFIDAVITS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS.

The proposed amendment is a technical change to recognize the methods for filing an affidavit under Rule 5. The committee approved the rule for publication for comment.

(7) ADJOURN

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