UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – October 22, 2014

Present:	Rod N. Andreason, Hon. John L. Baxter, Hon. Evelyn J. Furse, Jonathan Hafen, Terrie T. McIntosh, Amber M. Mettler, Hon. Derek Pullan, Leslie W. Slaugh, Trystan B. Smith, Paul Stancil, Hon. Kate Toomey, Barbara L. Townsend
Telephone:	Hon. Lyle R. Anderson
Staff:	Timothy Shea, Heather M. Sneddon
Not Present:	Sammi V. Anderson, Hon. James T. Blanch, Steve Marsden, David W. Scofield, Hon. Todd M. Shaughnessy, Lori Woffinden, Scott S. Bell, Lincoln Davies

I. Welcome and approval of minutes. [Tab 1]

Jonathan Hafen welcomed the committee. Rod Andreason moved to approve the draft minutes from last month, which motion was seconded and unanimously approved.

II. Rule 7. Pleadings allowed; motions, memoranda, hearings, orders. [Tab 2]
Rule 54. Judgments; costs.
Rule 58A. Entry of judgment; abstract of judgment.
Form 22. Judgment.

Rule 7. Tim Shea made the changes requested at the last meeting, including the nomenclature for naming motions and memoranda. As to subsection (j)(1), Mr. Shea suggested that it be left as a definition with the use of the term "complete." Because he was unable to find "register of actions" in the rules elsewhere, he proposed "docket" as is used in the appellate rules. He suggested that we repeal and reenact the rule to allow for better readability in submitting comments.

Discussion:

- Leslie Slaugh suggested that we delete the phrase "on a motion" in subjection (j)(1), line 90. If the judge makes a decision following trial, the same rules should apply. Mr. Shea indicated that this change was proposed at the last meeting, but Judge Shaughnessy believed the rule should address orders on motions only. Nevertheless, the current rule on motions is being applied well beyond its scope. The committee discussed at length whether "on a motion" should remain in the rule, taking into account the comments of Prof. Stancil, Rod Andreason, Mr. Slaugh, Judge Furse, Trystan Smith, Jonathan Hafen and Amber Mettler, as well as Judge Shaughnessy's comments from the last meeting. In particular, Prof. Stancil and Mr. Slaugh commented that "on a motion" is redundant in a rule that addresses motions. Heather Sneddon raised Judge Shaughnessy's comments at the last hearing in favor of keeping "on a motion" in the rule to cure the existing confusion over an order's "completeness" with respect

to a motion versus the requirements for a "final judgment" for purposes of appeal. The committee then discussed the proper structure of the first sentence of subsection (j)(1) to achieve clarity and better readability. Judge Furse questioned whether the phrase "however designated" is necessary. Mr. Shea recommended that the committee keep the phrase, as decisions by judges are called several things (e.g., rulings, orders, memorandum decisions, opinions, etc.). Although "on a motion" is new to Rule 7, Mr. Shea commented that he believes it will work.

- Mr. Slaugh proposed the elimination of "to" on lines 26 and 38, to account for motions "for" summary judgment, etc. He likewise proposed removing "the" from the phrase "memorandum opposing the motion" in subsection (d). Concerning lines 27, 33, 37, and 55, he questioned why the relevant portions of cited documents are excluded. As a practical matter, will practitioners be encouraged to block-quote from cases? Further, how will practitioners determine the number of pages they have utilized if these portions are excluded from the page count? He proposed that we take the exclusion out and leave the page limitation as it is, including the statement of facts. The committee discussed this issue at length, including whether subsection (c) accurately describes what should be included in the substantive text of a motion. Mr. Shea clarified that it was derived from the local federal rule. Judge Furse responded that the local federal rule addresses attachments, whereas subsection (c)(3) sounds more like the substantive text of the motion. Judge Furse commented that the material in (c)(3) should be treated separately from the motion. The relevant portions of the cited documents are to be attached. With the adjustment suggested by Judge Furse, Mr. Slaugh proposed that the page limit not include the appendix/exhibits. Mr. Hafen proposed that (c)(3) be kept, but redrafted to make clear that it refers to an appendix/exhibits, and is not counted toward the page limitations.

- Prof. Stancil stated that Rule 7(c), as written, assumes practitioners are permitted to file overlength motions and proposed that the committee consider adding "except on leave of court" or words to that effect. Mr. Slaugh agreed. Mr. Shea mentioned that overlength motions are addressed in subsection (n), lines 140-41, and will add limiting language throughout the rule where page limitations are expressed. Judge Furse also commented that the sentence on line 29 should come before the discussion of page limitations to make clear that it applies to all motions, not just overlength motions.

- Mr. Slaugh proposed to change the language in lines 209-10 to "which affects the time in which to appeal" and strike "and consequently the time in which to appeal." He also commented that line 137 prohibits motions to strike evidence. Mr. Shea stated that the intent was to change the practice with respect to motions to strike.

- With respect to subsection (j)(1), Mr. Andreason questioned whether it creates two species of an order: one that is a decision, and one that is an order "confirming" a decision. It is confusing, as it implies that two signatures are required. Judge Furse also raised the issue of oral rulings, which obviously are not signed because a party has been directed to prepare the order. Mr. Shea stated that the purpose is to distinguish between two species of order. A decision, when in writing and signed, is complete. The judge might or might not direct someone to prepare an order confirming the decision. Mr. Hafen commented that with respect to an oral ruling, it is not complete until signed. Mr. Slaugh proposed that the second sentence in (j)(1) be eliminated, as it is covered by the first. Mr. Shea stated that Mr. Slaugh

is probably correct; the second sentence came into being when the rule included language regarding the judge directing a party to prepare an order. That has been removed, so the second sentence makes little sense. Mr. Hafen proposed to remove the second sentence and "or order" in the third sentence, which the committee approved. Judge Furse also suggested the removal of "and order" in the title of the subsection, which the committee approved.

- Concerning subsection (j)(2), Ms. Mettler proposed changing line 93 to refer to the court's "decision" rather than "ruling." Messrs. Shea and Hafen agreed. The committee also discussed whether there is a need for line 97, which provides that the "court may prepare and serve an order." Mr. Shea commented that court-prepared orders are not intended to go through the process described in (j)(2). The committee discussed the sentence and concluded that, even though some practitioners file objections to proposed orders rather than engaging in a discussion/negotiation regarding the proposed order language, which may be a reason to keep the sentence, the court has the inherent power to enter orders. The committee agreed to remove the sentence.

- Ms. McIntosh suggested grammatical edits to lines 172-79. Mr. Shea agreed to rephrase them and to create a new sentence after the last bullet point.

- Judge Baxter moved to approve Rule 7 as discussed, and Mr. Slaugh seconded. The committee voted unanimously in favor of sending Rule 7, as discussed, to the Rules of Appellate Procedure Committee for review and comment.

Rule 54. Mr. Shea reported that he did not believe any changes had been made since the last meeting. The rule follows the federal rules pretty closely. In lines 2-3, however, the committee has proposed an affirmative definition of a judgment whereas the federal rule does not.

Discussion:

- Mr. Slaugh suggested changing line 2 from "a decree and any order" to "a decree or order" instead. Mr. Andreason suggested further that the phrase read "any order or decree."

- Mr. Slaugh also expressed concern that in line 12, Rule 54 says "expressly states" as opposed to the phrase "expressly determines" that is in the federal rule. Mr. Hafen commented that, as for rulemaking, we need a good reason to depart from the federal rules. Mr. Shea indicated that he would change the language to follow the federal rule.

- Judge Anderson commented that, from the case law, he believed that all claims between the parties must be adjudicated to obtain a judgment certified as final. Mr. Slaugh stated that the judgment must be a discrete unit such that the facts pertaining to the claims requested to be certified are not intertwined with the remaining claims. In other words, not all claims between the parties have to be decided. Mr. Shea added that the rule requires there to be "no just reason for delay." He also commented that there are nuances in the case law that are not codified in the rule.

- With the proposed changes, Judge Toomey moved to send Rule 54 to the Rules of Appellate Procedure Committee for review and comment. Ms. Mettler seconded and the committee voted unanimously in favor of the motion.

Rule 58A. Mr. Shea discussed the recent Butler case, which is cited in the note on Rule 7. Butler is part of a series of cases on finality and was issued after the last committee meeting. Based upon Butler, Mr. Shea recommended changes to Rule 58A to recognize that Rule 54(b) certification still requires a separate document that qualifies as a final judgment. Mr. Shea also redrafted subsection (b)(1) to identify the post-trial motions and rules that Judge Shaughnessy had raised. This follows the federal rule, but a party may request that a judgment be set out in a separate document even if not required. Mr. Shea also made changes to the advisory committee note.

Discussion:

- The committee discussed subsection (b)(2) at length and the confusion created by identifying select orders that are not required to be set out in a separate document as a judgment under (b)(1), when in fact those orders are not technically judgments at all, but then permitting a party to request that a "judgment" be set out in a separate document in (b)(2). Messrs. Slaugh and Hafen commented that we're really talking about an order in (b)(2), not a "judgment." Mr. Andreason suggested that (b)(2) refer to an order set forth in (b)(1). Mr. Smith agreed. Mr. Shea stated that under the federal rules, a party may request that a judgment be set out as a separate document as required by rule 58A, i.e., a party may request that what is required be done. Subsection (b)(1) is the exception. Mr. Slaugh commented that the federal courts are addressing a separate issue because in federal court, orders and judgments are more often prepared by judges. It may be addressing an issue where a clerk failed to do it, for example. Mr. Shea responded that perhaps (b)(2) is not relevant in state court. Mr. Slaugh said that a new practitioner may read (b)(2) and think that he/she *should* make such a request because he/she can. Mr. Hafen proposed that (b)(2) be removed from the rule.

- Concerning subsection (c), Mr. Slaugh noted that it mentions Rule 7(j) but limits it. Rule 7(j) addresses when a party is directed by the court to prepare an order. Rule 58A(c) mandates the prevailing party to prepare, but in pro se cases, the court will often direct the lawyer of the represented party to prepare the order, even if that party lost. Mr. Shea suggested that the judgment be prepared consistent with Rule 7(j), to which Mr. Slaugh agreed. Mr. Andreason expressed his concern that we are eliminating the "default" of the prevailing party preparing the judgment. Mr. Slaugh commented that before, the rule required that the prevailing party "shall" prepare it, but the other party "may." Judge Furse stated that there may be value in stating—in the rule—what parties are required to do rather than referring back to Rule 7(j). Messrs. Shea and Slaugh suggested cut-and-pasting from Rule 7(j). Mr. Hafen proposed that the rule include an introductory phrase that "unless the court prepares the judgment or otherwise directs." Mr. Slaugh agreed to that suggestion, proposing that Mr. Andreason's suggestion also be included that the prevailing party be the presumptive party to prepare the judgment. Mr. Shea expressed his hesitation regarding the prevailing party, as that language caused trouble with Rule 7. The intent was to permit the judges to direct traffic. He will prepare a modified subsection (c) with a cut-and-paste from Rule 7(j), incorporating the committee's comments.

- The committee identified minor typographical and grammar changes to Rule 58A, which were unanimously approved.

- Ms. Mettler questioned how Rule 58A was expected to operate with a request for attorneys' fees. Messrs. Hafen and Slaugh recognized this as an issue. Mr. Shea commented that our case law is different than the federal case law. Attorneys' fees were purposefully left out of the list in Rule 58A, whereas they are included in the federal rule. However, we may not be able to address it in Rule 58A at this time. Mr. Hafen agreed.

- Mr. Slaugh moved to entrust Mr. Shea with amending Rule 58A per the committee's comments, with a cut-and-paste from Rule 7(j), and sending it to the Rules of Appellate Procedure Committee for review and comment. Mr. Smith seconded and the motion carried.

Form 22: Mr. Shea discussed Form 22 dealing with the clerk signing a judgment. Judge Toomey moved to change the form as proposed by Mr. Shea. Mr. Slaugh seconded and the motion carried.

III. Consideration of comments to Rules 5, 26, 30, 37 and 45. [Tab 3]

Mr. Shea said these rules are coming back from the comment period and are ready for final comments/edits from the committee before going to the Supreme Court. The draft rules and synopses of comments were provided. Mr. Shea also described for new committee members how the process works for comments and proposed rule changes. Mr. Hafen said that the Supreme Court wants the committee to seriously consider comments received from the legal community.

Discussion:

- Judge Furse raised a question regarding a comment about Rule 5 and the electronic filing sealing/privacy issue: Is there a way to file a sealed document that is not shared with the other party? She thought that is what Mr. Bogart was getting at. Mr. Shea informed the committee that there is a classification for records like that, which is "safeguarded." These are kept from other parties and the public. Most are identified by statute. Based upon that classification, Judge Furse asked whether the rule should indicate that either notice will not be sent regarding "safeguarded" information, or that notice will be sent that informs other parties and counsel that "safehuarded" information has been filed (without giving access to that information). Mr. Shea does not believe that the current electronic filing system would accommodate that. Notice of filings is delivered immediately. There is not a current mechanism for an electronically filed document to be safeguarded—it must be paper-filed and hand-delivered to the judge. Judge Toomey mentioned that the filings are often in paper anyway because pro se litigants are involved. And with respect to documents to be reviewed in camera (trade secrets, for example), oftentimes attorneys will request that they be permitted to hand-deliver those documents to chambers and sometimes that method is accepted. Judge Furse questioned whether the rule should acknowledge that happens. Mr. Shea mentioned that a notice that safeguarded documents have been filed needs to be served. Judge Furse stated that the notice requirement also needs to be addressed.

- Mr. Shea stated that these were legitimate observations regarding the inadequacy of the current rule, but they were not the target of the amendments that went out for comment. Judge Toomey questioned whether the issue is prevalent enough to need a rule change. Mr. Shea said that "safeguarded" is a special classification. Trade secrets are "protected," but not kept from the other side. Ms. Mettler mentioned her experience that these types of materials are submitted by hand with an entry on the docket, but no electronic notice is given.

Oftentimes, parties will then file a redacted version, which the other parties receive notice of. Ms. Mettler expressed her understanding that a party must file the materials electronically, thereby making them public, and then request that their public status be changed, which is a non-starter.

- To summarize the committee's comments, Mr. Shea expressed his understanding that the court needs a process by which a party can electronically file a record and request that it be *not* public until the request is addressed by the court. The court also needs a process by which to file a record and request that it be *safeguarded*, i.e., that notice of it being filed go to the other side, but the substance of the record does not until the request is addressed. Mr. Hafen stated that he believes this is a technology issue. Ms. Mettler agreed.

- With respect to the non-technology aspect, Judge Furse questioned whether the rule should reflect an exception with respect to what must be served on other parties. For instance, what about "a paper relating to disclosure or discovery" that is being submitted for in camera review. The paper should not have to be served on other parties, but notice of its filing should be. She suggested that such an exception be reflected in line 4, "except for safeguarded materials," which could be defined elsewhere. Mr. Shea stated that there would need to be a way for an e-filer to flag it, such as a check box, but that does not currently exist. Judge Furse responded that if the technology doesn't exist, then there should be a requirement to file a notice that may be circulated.

- Mr. Smith questioned whether the committee should be making substantive decisions on what does not have to be provided to the other party. Mr. Shea commented that a party needs to be able to request it for documents that do not fall into the automatic "private" category and, instead, are within the judge's discretion to classify. For documents that are identified by rule as private, the e-filing system is programmed to recognize that type of document (such as a victim impact statement) and immediately treat it as private. No request is necessary in that situation.

- Nevertheless, Mr. Shea pointed out that this issue is bigger than the committee can resolve in responding to Mr. Bogart's comment; it would likely require the rule to be resubmitted for comment. If that's the case, it may not need to be resolved in this meeting. Mr. Hafen suggested that it be added to the list of future topics to address.

- Judge Furse commented that because line 4 includes "or as otherwise directed by the court," we should ensure that judges know about the gap in the rules and technology and that they may need to anticipate requests to treat certain filings as sealed pending the resolution of a request or issue. Judge Toomey indicated that the judges are aware of it, as they field phone calls on the issue. Even so, it may not hurt to send out a memo.

- The committee engaged in further discussion regarding the need for the e-filing system to address this issue, how best to handle it in the interim, what has been happening in practice, and whether the "as otherwise provided by these rules" language creates confusion. Mr. Shea proposed that the issue be set aside for the time being to permit him to speak with Deborah and the IT team to create a sound policy for the rule and come up with a technology solution that will allow a party to request that a document, other than those identified as "private" by rule or statute, be classified as something other than public and a process to

make that happen. Judge Toomey proposed that further discussion be tabled, as it may be a good idea to cover this issue more fully. Mr. Hafen mentioned that the committee will have time before these rules take effect, and suggested that the committee discuss the issue further at the next meeting.

IV. Rulemaking principles. [Tab 4]

For the benefit of new members, Mr. Hafen explained that the committee spent time last year discussing general philosophical principles that should govern what we do. We've done a pretty good job on most of the proposed rule-making principles, but could do better on some. One that informs the materials from Tab 3 is input: the committee will consider all comments on rule changes. It is important that we make sure everyone gets due process. Another principle is prioritizing, which Mr. Shea does very well given his discussions with other constituent groups and the justices. Mr. Hafen commented that it is helpful to have principles to keep the committee focused on the fundamentals of why we exist and what we're supposed to accomplish.

V. Rule 43. Evidence. [Tab 5]

Mr. Shea introduced the amendment to Rule 43, based on the federal rule, to accommodate remote testimony. It came about through the ad hoc committee of the Judicial Council to provide services in more remote locations. A civil rule was the simplest because there is a national model in the federal rules. The amendment is essentially lines 5-6. If the committee wants to include language regarding participation by lawyers, we can. Judges often do that in any event.

Mr. Shea indicated that the intent is to build an audio/video system in remote locations that is much better than the existing system. Each of the three rules committees is considering their proposed amendments.

Discussion:

- Mr. Hafen commented that another principle concern is expense and providing access to the courts for people without as much money. It could certainly be abused, but it would be meeting an issue of making the courts more available.

- Mr. Smith questioned whether there are federal cases addressing the meaning of good cause and compelling circumstances. Mr. Andreason asked whether they are redundant or in conflict. Mr. Slaugh questioned why the rule should include compelling circumstances and suggested that the judge should simply decide whether good cause exists. Mr. Shea mentioned that lines 5-6 reflect the federal rule, he believed verbatim, and that the juvenile committee has decided to keep compelling circumstances without referring to good cause. Judge Toomey questioned the meaning of compelling circumstances. Mr. Shea suggested that the meaning is intentionally left to the judge's discretion. Mr. Hafen and Judge Toomey mentioned technology problems with providing remote access. Given the potential detriment, Mr. Slaugh proposed that remote access be permitted based upon a showing of good cause without the inclusion of compelling circumstances. Judge Toomey questioned whether a stipulation constitutes good cause.

- Mr. Smith also questioned how the rule will affect the parties' and the court's ability to use and hear cross-examination. Right now, whether a video witness is permitted is based upon the judge assigned. If there is no case law addressing the issue, the standard will be an abuse of discretion. What does this mean for jury trials? The quality of cross-examinations will not be the same; the jury will miss many of the things that can only be seen through live testimony. Mr. Hafen agreed, and identified impeachment as an example. How will counsel impeach a person on the phone with documents? Judge Toomey mentioned that it is difficult to deal with an expert on the phone in a document intensive case.

- Prof. Stancil commented that he suspects federal rule makers did not intend for "good cause" and "compelling circumstances" to constitute a belt and suspenders approach, but rather, to reflect a broad range of discretion. They may give the appellate courts something to build upon in developing a common law rule. If we choose one, he proposed compelling circumstances. In his experience, good cause means too many different things. He also mentioned that the vaguery of "contemporaneous transmission" is probably helpful in ascertaining the appropriate mechanism under the circumstances. Judge Anderson stated that if compelling circumstances are required, he is concerned that judges may never get a chance to try the pilot program in the way it is intended to operate. New conferencing abilities now permit lawyers to appear by phone. Objections to whether the witness is who she says she is will still persist, but having a video witness in real time is much preferred over lawyers reading deposition testimony. He would prefer to have a less rigorous standard.

- Judge Baxter commented that, whatever language is used in the rule, it should be clear that remote access is not routine and language to that effect should be included.

- Judge Furse asked whether contemporaneous transmission should be both audio and visual. Mr. Shea responded that one of the administrative rules that came out of the ad hoc committee was that "contemporaneous transmission" means that everyone can see and hear everyone else.

- Mr. Andreason mentioned that good cause is much more broadly accepted, but the rule goes to how much we trust the technology and who is operating it. Are we comfortable enough now with the technology to adopt a rule on remote access? At some point we will be, but perhaps that time is not now. Mr. Hafen commented that in federal court and bankruptcy, lawyers and parties in southern Utah appear remotely by showing up in a courtroom in southern Utah. That may not be possible here, but at some point, we will get to the stage where everyone will have confidence. Mr. Shea stated that we need appropriate safeguards.

- Mr. Slaugh questioned whether we allow judges to make the decision of what is compelling, or we let the rules dictate. Mr. Shea commented that the intent was to leave discretion with the judge, even if the parties agree. Good cause and compelling circumstances probably cover the same base, but they raise the bar a bit. Mr. Shea agreed with Mr. Andreason that as time goes by, the legal community's comfort level will increase and technology will improve. Judge Furse mentioned that it may also change depending on whether a case requires a bench or jury trial, and what the witness is testifying about.

VI. Adjournment.

The meeting adjourned at 6:04 pm. The next meeting will be held on November 19, 2014 at 4:00pm at the Administrative Office of the Courts.