MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

APRIL 24, 2013

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Terrie T. McIntosh, Francis J. Carney, Honorable John L. Baxter, Honorable Kate Toomey, Professor David Moore, Honorable Lyle R. Anderson, W. Cullen Battle, Steven Marsden, Lori Woffinden, W. Leslie Slaugh, Honorable Derek Pullan, Honorable Todd M. Shaughnessy, Honorable James T. Blanch

TELEPHONE: Jonathan O. Hafen

STAFF: Tim Shea, Sammi Anderson, Diane Abegglen

EXCUSED: Professor Lincoln Davies, Barbara L. Townsend

GUESTS: Nathan Whittaker, Michael Jensen

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the March 27, 2013 minutes. The committee unanimously approved the minutes.

II. NEW APPOINTMENTS TO AND WITHIN COMMITTEE.

Mr. Wikstrom announced that Jon Hafen has been appointed by the Supreme Court to serve as chair of the committee when Mr. Wikstrom's term expires. Mr. Wikstrom also notified the committee that Judge Shelby has resigned and the Supreme Court has appointed Magistrate Judge Eva Furse to serve in his place. The committee expressed its pleasure regarding both appointments.

III. PROPOSED AMENDMENT TO RULE 13.

Mr. Nathan Whittaker joined the committee to revisit the prior month's discussion regarding a potential revision to Rule 13(e). Mr. Whittaker explained that Rule 13(e), which requires good cause to amend a pleading, could be inconsistent with Rule 15(a), which allows amendment any time before a responsive pleading is served. The committee discussed several possibilities to resolve the issue, including deletion or Rule 13(e) or adding language referring back to Rule 15(a). Mr. Slaugh noted that 13(d) and 13(e) should be treated consistently. The committee asked Mr. Shea to prepare some draft language for consideration at the next meeting.

IV. EFFECT OF DISCOVERY RULE CHANGES ON PROBATE PRACTICE.

Mr. Michael Jensen joined the committee to revisit the prior month's discussion regarding the application of the discovery rule changes to probate practice. Mr. Jensen suggested that the committee exempt probate matters from the rules; specifically that probate cases warrant an exception to the initial disclosures because there are no damages and the information found in the disclosures is already known from the petition initiating the probate matter. Mr. Jensen suggests that probate matters be exempted from initial disclosures, but not from the remainder of the discovery rules. Various committee members expressed the sentiment that disclosures are intended to require production of information early and thereby limit the need for discovery. Judge Toomey and Mr. Slaugh expressed interest in having a specialty rule for probate. Mr. Wikstrom suggested that Mr. Jensen return with a proposal endorsed by the Estate Planning section of the Bar. Mr. Wikstrom indicated his uneasiness with a temporary exemption from the rules, emphasizing the need for a comprehensive solution. Mr. Battle moved to table the discussion until more estate practitioners can join the dialogue. Mr. Slaugh seconded Mr. Battle's motion. Judge Pullan expressed a preference for a specialty rule that is unique to different kinds of litigation, whatever the type, disagreed with the concept of exemption, encouraging Mr. Jensen to work with his colleagues to define who has what responsibility in an independent, specialty rule, as other sections have done. Judge Shaughnessy echoed that concern and encouraged the section to propose an actual rule, not just concepts. The committee agreed to table the discussion to allow estate practitioners to develop and propose a specialty rule.

V. POST-TRIAL MOTIONS.

Mr. Carney led a discussion regarding potential revisions to the rules governing post-trial motions. First, Mr. Carney suggested updating the terms "directed verdict" to "judgment as a matter of law" and "judgment notwithstanding the verdict (JNOV)" to "renewed judgment as a matter of law." The committee approved these proposals.

Second, with respect to timing, Mr. Carney noted that the federal deadlines governing post-trial motions key off the act of filing. The Utah rules, however, key off of various different trigger verbs, including "move," "serve" and "made." Mr. Carney suggested that all verbs be changed to "file," thereby triggering motion deadlines from the act of filing, which is objectively verifiable and can be independently known.

Third, the Utah rule allows only 10 days to file a post-trial motion. The federal rules now allow 28 days. The committee agreed that the rules should be amended to allow 28 days.

Fourth, the committee discussed whether the Utah rule should require that a judgment as a matter of law be renewed at the close of all evidence. Mr. Carney explained that this is a procedural trap for the unwary and the federal rules have eliminated this requirement. The committee agreed to eliminate the requirement as well.

Last, Mr. Carney noted that the Utah rules are much more difficult to read than the federal post-trial motion rules. The committee discussed whether to undertake a rewrite intended to simplify the language, but not to convey any substantive changes beyond those discussed above. The committee ultimately agreed to undertake a linguistic rewrite patterned upon the language of the federal post-trial motion rules. Mr. Shea was asked to propose language for all the changes to the rules governing post-trial motions as reflected above.

VI. DISCUSSION OF POTENTIAL REVISIONS TO RULE 6.

In follow up to the discussion of post-trial motions, the committee discussed whether all timing requirements should be changed to a uniform 7, 14 or 21 days. The 3 day mailing period was also discussed. The federal rules allow 3 days for mailing even if a pleading is e-filed. As a general matter, the committee sees no reason to allow 3 extra days for mailing if the pleading or document is e-filed. With regard to documents that are not filed, such as discovery requests, the committee discussed revising the rule to require service by e-mail. The committee ultimately determined to table proposed revisions to Rule 6 to be discussed in connection with other rule changes.

VII. POTENTIAL AMENDMENTS TO RULE 7.

The committee previously approved the conceptual change to merge the motion and supporting memorandum into one document. Mr. Shea's efforts to effect this merger prompted further discussion. Mr. Slaugh noted that the federal rule allows a background section where a party can tell their story, but is not required to include every single fact in the statement of undisputed facts. There was general approval for this notion. Judge Shaughnessy noted the usefulness of a rule requiring a "Motion for X", so that judges can link related pleadings. The committee discussed whether this could be resolved through assigning a docket number to each filing or by requiring particular motions, memos, etc., to be linked when filing. Mr. Battle proposed revisions regarding the prohibition on filing a separate memorandum and regarding the prohibition on filing proposed orders with motions. Mr. Battle suggested that except in uncontested or ex parte matters, proposed orders not be filed before the court's decision. However, this does not taken into consideration the expedited discovery process, which deliberately requires competing proposed orders from the parties. Mr. Wikstrom noted the possibility that the committee may more effectively solve these matters through the e-filing process than through rule changes. Ultimately, Mr. Shea was asked to re-work the proposed Rule 7 revisions in light of the committee's discussion.

VIII. ADJOURNMENT.

The meeting adjourned at 6:03 pm. The next meeting will be held on May 22, 2013 at 4:00 p.m. at the Administrative Office of the Courts.