MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

OCTOBER 23, 2013

PRESENT: Jonathan Hafen, Chair, W. Cullen Battle, Scott S. Bell, Hon. James T. Blanch, Frank Carney, Prof. Lincoln Davies, Hon. Evelyn J. Furse, Terrie T. McIntosh, Hon. Todd M. Shaughnessy, Leslie W. Slaugh

TELEPHONE: Hon. Lyle R. Anderson, Lori Woffinden

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Sammi V. Anderson, Hon. John L. Baxter, Steven Marsden, David H. Moore, Hon. Derek Pullan, David W. Scofield, Trystan B. Smith, Hon. Kate Toomey, Barbara L. Townsend

I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the September 18, 2013 minutes. Mr. Shea noted that some typographical errors had been brought to his attention. It was moved and seconded to approve the minutes as amended to fix the typographical errors. The motion carried unanimously on voice vote.

II. REPORT ON PRESENTATION OF PROPOSED REVISIONS TO THE SUPREME COURT

Mr. Hafen and Mr. Shea next reported to the committee on their October 9, 2013 meeting with Utah Supreme Court. The purpose of this meeting was to present the committee's proposed revisions to Rules 58A and 64D as per UJCA 11-105(a). Rule 64D was approved and adopted by the supreme court as presented. The supreme court amended the committee's proposal on Rule 58A by restoring the final sentence in subdivision (d) and adding to the beginning of that sentence the clause "Except as provided in Rule of Appellate Procedure 4(g)." The supreme court then adopted the revision as amended. At the meeting, the supreme court expressed its appreciation of the committee's work and

encouraged the committee to remain active and vigilant in ensuring that needed revisions to the rules are promptly addressed.

III. RULEMAKING PRINCIPLES

Mr. Hafen next led a discussion on the principles that should guide the committee in drafting and revising the rules. Mr. Shea prepared a document entitled "Seven Pillars of Rulemaking" that had been distributed to committee members in the meeting materials. Mr. Hafen asked for comments and suggestions on the document.

With respect to the principle of certainty, Judge Furse questioned whether "provide directions to an outcome" was the correct wording, as it sounded too close to "outcome determinative." Mr. Slaugh added that the intent of the rules was not always to provide directions to an outcome, as some rules explicitly call on the trial court to exercise discretion. Mr. Shea responded that his intended meaning was that the rules should create a roadmap for the litigation process. Mr. Hafen suggested amending the explanation of certainty to "the rules should provide a predictable process."

Judge Blanch suggested adding the principle of consistency. This principle would recognize the value of having the Utah rules correspond to the federal rules unless there is a good reason to deviate from those rules, as it allows state courts and practitioners to cite federal case law as persuasive precedent. He added that we should bear in mind when drafting our rules that there is a danger in improving upon "imperfect" language that is identical to the language of federal rules—it throws the applicability of federal case law into question. Additionally, as so much of our wording comes from the federal rules, tweaking the language just to "clarify" may actually increase confusion, as it raises the question of whether the change was meant to be to substance or just to style. Mr. Hafen noted on the theme of consistency that the committee should strive to make the rules internally consistent.

Members raised questions about the difference between the principles of clarity and simplicity. Mr. Shea responded that clarity emphasizes using plain language and avoiding legalese, while simplicity emphasizes avoiding convoluted procedures. Judge Furse suggested that there should be a principle stating that the rules should accurately and comprehensively describe the litigation process. If there are unwritten rules or procedures, the committee should attempt to document them so that *pro se* litigants or practitioners who are in-

experienced in practicing before the state district courts can know what to expect.

Regarding the principle of priority, Mr. Hafen noted that saying "requests from the legislature and supreme court will take priority over all tiers" would create an exception to the three-tiered system and lead to confusion. Rather, he suggested amending the statement to read "requests from the legislature and supreme court will be given the highest priority."

Regarding the principle of input, Mr. Hafen recommended that we include the statement, "The committee should thoroughly review comments and suggestions."

IV. PRIORITY OF PENDING ISSUES

Mr. Hafen proceeded to focus on the issue of priority. He noted that one of the items he wanted the committee to consider was the priority that each proposal should be given. There are currently over 25 proposals awaiting the committee's consideration and action, and some of them were more important for the committee to consider than others. He recommended using colors to indicate priority. A proposal that is designated "red" would be one that the committee believes should be taken care of at the next meeting if possible. A proposal designated "yellow" would be one that the committee believes is important and would like to take care of as soon as possible, but it is not so urgent as to push other matters off the agenda for the next meeting. Finally, a proposal designated "green" is something that is not urgent and will be considered when the committee has time or when a related proposal comes before the committee.

Members asked whether proposals would be ranked within the categories—that is, if there are multiple issues that are designated as "red," whether the committee would determine the order in which those issues would be considered. Mr. Hafen suggested that it would likely be adequate if the committee designated a priority color to a proposal and then let Mr. Shea prioritize within those categories when he put together the meeting agenda. Mr. Hafen also stated that he wanted to avoid spending excessive amounts of the committee's time on planning future meetings, as it would detract from the substantive business of the committee.

The committee then considered the list of proposals awaiting committee action. The committee assigned them priority as follows:

- Review all rules for consistency regarding "filing" and "serving" documents (not submit, deliver, etc.) ..... GREEN
- Style amendments ..... GREEN
- *Arbrogast v. River Crossings*, 2010 UT 40 Supreme Court suggestion that the Standards of Civility be incorporated in the URCP ..... RED
- E-filing. Rule 5. Delete requirement that party has to have agreed to service by email. Paragraph (d) filing/service in light of change to "filing" in other rules ..... RED
- E-filing. Rule 5. Certificates of service for e-filed documents ..... RED
- E-filing. Rule 6. Time. Review all rules for conformity with 7/14/21/28 days service ..... RED
- E-filing. Rule 10. No script signature; Margins ..... RED
- E-filing. Witness affidavits. E-file copy. Keep original ..... RED
- E-filing. Replace judge's signature block with "end of order." ..... RED
- E-filing. Rule 74/75. Permit NOLA and W/D of counsel on the record in open court if approved by the judge. Lawyer-for-the-day programs, such as debt collection calendar and OSC domestic calendar ..... RED
- Rule 7. Finality of orders. Combine memo into motion. Move special SJ provisions to Rule 56. Move special discover provisions to Rule 37 ..... RED
- Rule 7. Serve motion to renew judgment by personal service ..... YELLOW
- Rule 15. Attach a proposed pleading to a motion to amend a pleading ..... YELLOW
- Rule 26. File all dispositive motions or certificate of readiness for trial within 28 days after close of expert discovery. Include in notice form ..... YELLOW
- Update 26.1(b) to match 26(a)(2) ..... YELLOW
- Rule 26.1. Amend so that all dates trigger from the first answer, rather than triggering from each step along the way ..... YELLOW

- Rule 26.3 Disclosures in employment actions ..... GREEN
- Rule 26.4. Special rules for disclosure and discovery in probate cases. Rule 81. Applicability of rules in general ..... GREEN
- Rule 45. Require notice of third party subpoena duces tecum to include the subpoena ..... RED
- Rule 4. Require copy of summons to be filed with proof of summons ..... RED
- Delete or amend Rule 12(j) ..... YELLOW
- Delete or amend Rule 13(e), update Rules 13, 14 and 15 ..... YELLOW
- Post-trial motions. 50, 52, 59, 60 ..... YELLOW
- Rule 54. Statement of post judgment interest rate in final judgment ..... GREEN
- Rule 63. Response and request to submit for decision are not proper on a motion to disqualify. Incorporate federal grounds for recusal into URCP. 28 U.S.C. § 455. Disqualification of justice, judge, or magistrate judge ..... YELLOW
- Rule 101. Motion practice before court commissioners. Rule 109. Automatic temporary domestic orders ..... GREEN
- Rule 106. Modification of final domestic relations order ..... GREEN

The committee agreed that Representative Ken Ivory's proposal regarding Rule 68 would be stricken from the list. The committee had a meeting with him about the proposal in April 2012 and there has been no further word from him since that time; it appears he is no longer pursuing the proposal.

The committee recommended handling style amendments and checking for consistency regarding "filing" and "serving" documents as individual rules were considered for substantive purposes.

The committee agreed to consider all of the e-filing proposals at the next meeting as well as the Utah Supreme Court's suggestion in *Arbrogast*.

Mr. Carney asked whether the committee had a mechanism for responding to a proposal for revision. Mr. Shea responded that his usual practice is to confirm receipt of the proposal and inform the petitioner that he will inform them when it is on the agenda. When the proposal is put on the agenda, he invites the petitioner to present the proposal before the committee.

Several members emphasized the need to review the family law rules. Judge Blanch noted that Rule 108 currently limits a party seeking an evidentiary hearing before a judge in an objection to commissioner's recommendation from offering evidence that was not considered by the commissioner below. However, as commissioners do not take evidence, this seems to be internally inconsistent. Judge Shaughnessy also noted that the way the rule is drafted currently suggests that a party is entitled to *de novo* consideration of every issue decided by the commissioner.

Commissioner Blomquist is currently working with members of the family law section of the Utah State Bar to revise Rule 101 and to create a rule establishing automatic temporary orders. Mr. Slaugh and Mr. Whittaker have also been working on a set of revisions to the family law rules. The committee recommended that Mr. Slaugh and Mr. Whittaker expand their review of the rules to consider the issues identified with Rule 108. When Mr. Slaugh and Mr. Whittaker have finalized their proposal, the committee recommended that Mr. Hafen write a letter to Commissioner Blomquist and her group submitting the proposal for their consideration and input.

V. RULE 58B

Discussion. The committee proceeded to consider the proposed revision to Rule 58B. At the previous meeting, the committee had approved a motion to amend the wording of this revision and resubmit the revision for public comment. Since the previous meeting, Judge Shaughnessy and Mr. Whittaker had identified possible concerns that the committee may want to consider before submitting the proposed revision for public comment.

Judge Shaughnessy expressed his concern that because of language about filing a partial satisfaction of judgment, the revised rule could be read to require a judgment creditor to file a partial satisfaction each time the debtor made a payment against the judgment. Mr. Shea pointed out that the language in the revision only required a creditor to file a satisfaction after *full* satisfaction of the judgment. Partial satisfactions would be permitted but not required. Judge Shaughnessy was satisfied with that explanation and withdrew his concern.

Mr. Whittaker referred to language in Rule 58B that provides for filing a satisfaction of judgment for one of multiple judgment debtors, and suggested that the committee may want to consider a provision requiring a creditor to file a satisfaction upon any one of multiple debtors making a full payment of their

obligation on the judgment. Several members of the committee commented that such a circumstance would be rare, as debtors who have joint and several liability on a judgment could not satisfy their part of the judgment without satisfying the whole judgment, and that judgments that allocated the judgment according to the Liability Reform Act tend to be drafted so that there is a separate judgment against each debtor, rather than each debtor being responsible for a certain percentage of one judgment. Mr. Whittaker was satisfied with that explanation and withdrew his concern.

Mr. Slaugh noted that the rules dealing with writs of garnishment and execution and on seizure of property already require the creditor to state the amount remaining on the judgment upon filing an application with the Court. The statement in that application fulfills the same function as a partial satisfaction. Mr. Slaugh suggested that subdivision (c) was redundant, but that the language did not hurt anything and could be left where it was.

Committee Action. As both concerns were withdrawn, Mr. Hafen asked for any other proposed changes to the proposed revision before submitting it for public comment. As no changes were proposed, the proposed revision of Rule 58B as contained in the meeting materials was thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)-(3).

VI. RULE 7

At the September meeting, a motion was approved to prepare a draft for review that incorporates the proposal to combine the motion and memorandum, the proposals for submission of orders, the proposal for the request to submit, and other proposals for Rule 7 previously identified. Mr. Shea, who was tasked with preparing this draft, presented it to the committee. A copy of this draft was included in the meeting materials.

In the proposed draft, the current Rule 7 would be divided into 7 and 7A. The proposed Rule 7 would define the pleadings allowed to be filed in a civil case as the current Rule 7(a) does; it would incorporate the updated language of the federal version of Rule 7(a). The proposed Rule 7A would deal with motion practice, and would include:

- A general definition of a motion and references to other rules that provide special requirements for particular motions (subdivision (a));

- requirements for the title, length, format, and content of motions, including a requirement that a motion be combined with its supporting memorandum in the same document (subdivision (b));

- requirements for the title, length, format, and content of response and reply memoranda, including a prohibition on making a motion in a response or reply memoranda (subdivisions (c)–(d) & (j));

- a provision for responding to an objection filed in a reply memorandum (subdivision (e));

- a requirement that a party seeking a decision on a motion file a request to submit for decision and provisions outlining the format of that document (subdivision (f));

- provisions outlining the parties' right to a hearing on a motion and the procedures for requesting a hearing (subdivision (g));

- a provision for citing supplemental significant authority (subdivision (h));

- provisions regarding the form and requirements of orders and proposed orders, as well as the procedure for circulating proposed orders (subdivisions (*i*) & (m));

- requirements for *ex parte* motions, including motions for overlength motions and memoranda (subdivisions (k)–(l)); and

- a prohibition on using orders to show cause for anything other than to address violations of existing orders (subdivision (n)).

A. Proposed Rule 7A(i): Orders and the Question of Finality

Discussion. The committee proceeded to consider Subdivision (*i*) of proposed Rule 7A, which addresses orders. The draft includes a provision that states: "The order is a final judgment that can be appealed if it satisfies Rule 54(b) and Rule 58A(c)." Mr. Shea said that this language is intended to abrogate the holdings of *Central Utah Water Conservancy District v. King*, 2013 UT 13, 297 P.3d 619*, Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P.3d 966, and *Code v. Utah Dept. of Health*, 2007 UT 43, 162 P.3d 1097. These cases hold that Rule 7(f)(2) requires that a separate order be prepared by the prevailing party unless the district court gives explicit direction that no additional order is required.

Mr. Shea remarked that the provision requiring the prevailing party to prepare a proposed order "unless otherwise directed by the court" was not intended to have anything to do with finality, but rather to establish the presumption that an order memorializing a judge's ruling from the bench would be drafted by the prevailing party, and to preserve a judge's discretion to direct another party to prepare the order.

Members expressed their concerns that the committee may be overstepping its bounds in "overruling" an established precedent of the Utah Supreme Court. Mr. Hafen pointed out that the supreme court has the final say in whether to adopt the revision, so the committee would just be suggesting that the supreme court "overrule" itself. Moreover, as the supreme court asked the committee in *Central Utah Water* to "review rule 7(f)(2) and address the possibility of endlessly hanging appeals," 2013 UT 13 at ¶ 27, it would not be inappropriate to bring them that suggestion. Mr. Shea recommended that the committee present the supreme court with a proposal and seek the justices' input before sending out the rule for public comment.

Mr. Slaugh noted that the draft still contains the language relied upon by the supreme court in *Central Utah Water*: "Unless otherwise directed by the court, within 14 days after the court's decision the prevailing party shall serve upon the other parties a proposed order in conformity with the court's decision." 2013 UT 13 at ¶¶ 9-10. A provision stating that "the order is a final judgment" if it satisfies other rules would not be effective if the memorandum decision authored by the judge is not an order under the rules.

Judge Shaughnessy agreed and pointed out that the reference to the court's action as a "decision" strongly suggests that it would not be an order under the rules. He noted that under the current rule, he could prepare a document with the title "Final Order Granting Summary Judgment," but unless he includes the "magic words" at the end of the document —"this is the final order of the court and no further order is required"—it would not be final or an order, irrespective of the title. The problem with the current requirement of the "magic words" is that it exalts form over substance, and creates different requirements for an order produced by a judge and one produced by a party.

Judge Shaughnessy further explained that the problem of finality does not only apply to appealable orders, but also to interlocutory orders—under Rule 7(f)(2), a judge-issued order on discovery not containing the "magic words" would not be an "order" under the rule until a separate order was prepared by

a party. That raises the question of whether the party could be sanctioned for failure to comply with a decision that has not been memorialized in an order.

Judge Anderson pointed out that now that proposed orders are filed in an editable format by e-filing, it becomes even more ambiguous as to whether an order was prepared by the prevailing party or by the judge. He posed a hypothetical situation where a party submits a proposed order to a judge via e-filing, and the judge edits it before issuing the order. At what point does the document change from the party's proposed order under Rule 7(f)(2) into a decision written by the judge? Is a document bearing the caption of a party but whose content is entirely written by the judge an order or a decision? Does the fact that the party's caption appears at the beginning of the document negate the need to include the "magic words" that no further order is required?

Mr. Davies asked how often the finality problem actually affects litigants. Mr. Shea replied that it has affected several cases since 2007, including a case in which the court of appeals rejected Judge Anderson's order of dismissal as non-final, even though Judge Anderson used a form approved by the administrative office of courts.

Mr. Slaugh noted that while the current rule is somewhat absurd in that a written order that purports to be a "final order" in its title would not be a final order for purposes of appeal, it also removes the uncertainty of a party having to determine whether an order starts the time for filing an appeal. While the document described by Judge Shaugnessy is clearly intended to be a final order, there are also examples where the intention of finality is less clear. For example, consider a memorandum decision granting a motion to dismiss under Rule 12(b)(6) that does not explicitly order that the case is dismissed, but rather just states that "the motion is granted." Did the judge intend for the memorandum decision to be a final order? The case law prior to *Code* and *Giusti* was unclear on that issue.

Judge Blanch observed that the document referred to by Judge Shaughnessy would not be a final, appealable order in federal court either. Rather, the court clerk would file a judgment as a separate document under Rule 58 of the Federal Rules of Civil Procedure. The filing of that document would trigger the time for filing an appeal. While the volume of cases handled in state courts make it impractical for Utah to adopt that system, the "magic words" perform a similar function, as they give the parties an unambiguous indication that the

time to appeal is running. Also, judges are figuring out that they have to put in the "magic words," which leads to fewer hanging appeals.

Judge Blanch further noted that without the rule, there is an ambiguity as to whether something like a verbal ruling from the bench would start the time for appeal. It would be better to have a rule that leads to endlessly hanging appeals than one that cut off an unsuspecting party's appellate rights due to an ambiguity.

Mr. Cullen asked what the potential problems would be with requiring a district court to unambiguously certify that an order is final and appealable for purposes of starting the time to file an appeal. Mr. Shea replied that it would be an extra step in the process and would increase the likelihood of endlessly hanging appeals.

Mr. Whittaker noted that Rule 58(c) of the Federal Rules of Civil Procedure deals with the problem of endlessly hanging appeals by providing that if an order that disposes of all pending claims has been issued, but the court clerk neglects to enter a judgment in a separate document, that order is deemed a judgment for purposes of appeal after 150 days have elapsed from the issuance of the order.

Judge Shaughnessy expressed his preference that there be a final judgment in every case that was entered as a separate document that had the title of "judgment" on the caption. However, Judge Blanch cautioned that in many cases there are multiple judgments entered in the case even though they do not dispose of all pending issues. For example, in a family law case, a party can be awarded attorney fees under the fee-sharing statute to allow that party "to prosecute tor defend the action." That is routinely called a judgment, even though it is entered during the pendency of the case. Rule 7(f)(1) provides that these interlocutory orders to be "enforced in the same manner as if it were a judgment." Therefore, if the committee were to enact Judge Shaugnessy's suggestion, either the rules would have to prohibit using the term "judgment" to refer to an interlocutory order for the payment of money, or to come up with a different term for an order disposing of all issues in a case.

Several members then suggested if the separate document and entry of judgment requirements in Rule 58 of the Federal Rules of Civil Procedure were altered to specify that the judgment would be prepared by the prevailing party, that may provide a good basis for implementing Judge Shaugnessy's sugges-

tion. Also, the provision in Subdivision (c) of the rule would solve the problem of endlessly hanging appeals. Mr. Slaugh and Mr. Carney noted that Utah's Rule 58A(a)–(c) contained provisions that were outdated and did not reflect the practice of the courts, so it would be a good opportunity to review and update these provisions as well.

Committee Action. It was the sense of the committee that it would be helpful to have a draft of Rule 58A incorporating the language of Federal Rule 58(a)–(c) with references to the clerk changed as appropriate for further discussion of the issue. The issue was informally tabled to allow the draft to be prepared and circulated at a future meeting.

B. Other Comments

Mr. Hafen asked for comments regarding the other provisions of the proposed draft of Rule 7 and 7A.

Judge Furse recalled Mr. Marsden's comment in an earlier meeting that he felt following the local federal rule combining the motion and memorandum resulted in a somewhat clunky document. Judge Furse blamed this clunkiness on the local rules referring to the motion and memorandum as two documents combined into one. The federal rules define a written motion in such a way as to exclude a statement of facts or argument from being part of a motion, so the local federal rules must refer to a motion and memorandum as separate things. However, the Utah rules could avoid this clunkiness by defining a motion as including the sections traditionally in a memorandum.

Mr. Slaugh expressed his concern that the requirements for the title of a motion may be too strict, as it appears not to allow for inclusion of words like "amended," "*ex parte*," etc. He also noted that the draft changes the page limit for motions and initial memoranda from ten pages of argument to ten pages total. While some members suggested changing this back to ten pages of argument, others argued that it would be better to just increase the page limit for the entire motion, as the current rule encourages smuggling argument in the other sections of the motion or memorandum.

Judge Blanch expressed his approval of the provisions regarding objections to evidentiary issues in lieu of filing a motion to strike. However, as there is existing case law that explicitly refers to the requirement of a motion to strike, it needs to be made explicit either in the text or the committee notes that the rule is replacing the requirement of a motion to strike with this procedure.

Mr. Davies asked whether it was necessary to divide 7 and 7A into two rules. Dividing the rules creates a very short Rule 7, changes the references to rules from those in prior case law, making them harder to research, and potentially keeps 7A from being noticed as it was out of regular numerical order. Mr. Hafen agreed and asked for unanimous consent to put the two rules back together for the next draft. There was no objection.

VII. ADJOURNMENT

The meeting adjourned at 5:59 p.m. The next meeting will be held on November 20, 2013 at 4:00 p.m. at the Administrative Office of the Courts.