MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

MARCH 26, 2014

PRESENT:	Jonathan Hafen, Chair, W. Cullen Battle, Hon. James T. Blanch, Frank Carney, Prof. Lincoln Davies, Steven Marsden, Terrie T. McIntosh, Hon. Derek Pullan, Hon. Todd M. Shaughnessy, Leslie W. Slaugh, Trystan B. Smith
TELEPHONE:	Hon. Lyle R. Anderson, David H. Moore, Lori Woffinden
STAFF:	Timothy M. Shea, Nathan Whittaker
EXCUSED:	Sammi V. Anderson, Hon. John L. Baxter, Scott S. Bell, Hon. Evelyn J. Furse, David W. Scofield, Hon. Kate Toomey, Barbara L. Townsend

I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the February 26, 2014 minutes. It was moved and seconded to approve the minutes as drafted in the meeting materials. The motion carried unanimously on voice vote.

II. COMMITTEE MEMBERSHIP

Mr. Hafen next informed the committee on a letter he had recently received from Chief Justice Durrant of the Utah Supreme Court. The letter reminded Mr. Hafen of the change to the rules governing the appointment of committee members last July. Because of to the high level of interest shown in serving on the committee, the supreme court discontinued the former policy of reappointing members at the end of their terms until they no longer wished to serve. Hereafter, as provided in UCJA 11-101(4), "No lawyer may serve more than two consecutive terms on the committee unless appointed by the Supreme Court as the committee chair or as an institutional or court representative (e.g. an academician, judge, recording secretary, etc.) or when justified by exceptional circumstances."

III. Report on Meeting with Supreme Court

Mr. Hafen next reported to the committee on the meeting that occurred that morning between representatives of the committee and the Utah Supreme Court.

A. Presentation of Proposed Revisions to Rules

At the meeting, the committee's proposed revisions to Rules 6, 10, 58B, 74, and 75 were presented to the Utah Supreme Court as per UCJA 11-105(1). The supreme court approved and adopted the proposed revisions as presented. The changes are effective as of May 1, 2014.

B. Discovery Survey Results

Mr. Hafen next noted that at the meeting, they had discussed the interim results of the discovery survey being undertaken by the National Center for State Courts. He then invited Judge Pullan to summarize those results and to present to the committee the ideas and proposals discussed at the meeting.

Judge Pullan introduced the survey results, which were previously distributed to the committee in the meeting materials. He noted that the results reflected six quarters of survey data, and that two further quarters of survey data are expected to be gathered before the survey is completed. He drew the committee's attention to the observations that were summarized on pages 15–16 of the meeting materials. He was especially encouraged by the increasing perception that the initial disclosures and standard discovery limits are sufficient to evaluate the case and prepare for trial. However, he was concerned by the perception that the new rules do not have a significant impact on the cost and length of litigation.

Members discussed the results and the methodology of the survey. Some members raised the concern that the high percentage of debt collection (21.9% of responses) and domestic cases (29.6% of responses) may have skewed the results, as they both tend to be outliers from the "standard case" in terms of discovery needs. Also, the declining response rate suggested that respondents were suffering from "survey fatigue."

C. Pilot Program on Judicial Case Management

Discussion. Judge Pullan observed that if the new discovery rules are not having a significant impact on the cost and length of litigation, it is likely that

attorneys are regularly stipulating around the rules. This is problematic, as it negates the purpose of changing the rules. He noted that this stipulation problem appeared especially acute in Tier 2 and 3 cases, where respectively, 24% and 9% of respondents reported completion of fact discovery within the standard time for completion. Judge Pullan suggested that the reason that more improvement in the area of length and cost of litigation has not been made is the lack of active judicial case management. He quoted federal district Judge David G. Campbell's statement that "study after study has confirmed that judicial case management is the answer [to backlog and inefficiency in U.S. courts]. Cases resolve in less time, at lower cost, and often with better results when judges manage them actively." Institute for the Advancement of the American Legal System, *Working Smarter not Harder: How Excellent Judges Manage Cases* (2014), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Working_Smarter_Not_Harder.pdf.

While the committee previously rejected the idea of judicial case management as requiring far more resources than are available to the courts, Judge Pullan suggested that it did not need to be an all-or-nothing proposition. If there was a way of identifying the cases that are most likely to be complex and most in need of active judicial management, judges could focus their efforts at case management accordingly. Judge Pullan suggested some ways of identifying complex cases and determining the cases for management, such as Tier 3 cases, cases where there are multiple counsel on a side, personal injury cases, etc.

At the case management conference, the trial court, with input from counsel, could set out firm deadlines on fact discovery, expert discovery, and dispositive motions. It would be much more difficult for a party who had input into the formation of the discovery deadlines to complain that it was not given enough time. The judge can also set up expectations with regard to civility and professionalism, get a sense about how involved he or she will need to be, and show attorneys that he or she is available and accessible to lawyers when certain aspects of the case begin falling off the tracks.

With that in mind, Judge Pullan explained that he proposed a pilot program for judicial case management to the supreme court. Certain judges in the Second, Third, and Fourth Districts would be asked to engage in case management of some of their cases selected based on predetermined criteria for complexity, and the results would be evaluated after a certain amount of time. The supreme court approved the idea and instructed the committee to flesh out a

pilot program at the next meeting, and then present it to the justices for their approval.

Committee Action. A subcommittee consisting of Mr. Hafen, Mr. Shea, Judge Pullan, Judge Blanch, Judge Shaughnessy, and Debra Moore, the District Court Administrator for the Administrative Office of Courts, was formed to put together a draft proposal for the committee's input and approval. Mr. Hafen invited members to share any ideas they had with respect to the issue.

IV. SUBCOMMITTEE REPORT ON FINAL JUDGMENT RULE

Mr. Hafen next invited Mr. Battle to report on the progress of the subcommittee appointed at the meeting of January 22, 2014 to work on a proposal for revising the Final Judgment Rule.

Discussion. Mr. Battle informed the committee that they had made progress with their proposal, but needed the committee's direction on the issue of when an order is complete—that is, when an order is understood to be the court's final expression on the subject. Mr. Battle noted that this was a separate question from when a judgment was final for purposes of appeal, and would only affect a party's appellate rights in the case of interlocutory appeals.

The subcommittee had considered two different options with respect to the completeness issue. The first option is that an order signed by the judge is not complete unless there is an express direction that nothing further is required. This option is consistent with the current case law on the subject. The second option is that an order signed by the judge is complete unless there is an express direction for some further action. This would be a departure from current case law, but would have the benefit of avoiding the requirement of invoking "magic words" to signify completeness and of resolving questions regarding the enforceability of orders.

Judge Blanch argued in behalf of the second approach, noting that when judges draft memorandum decisions, they tend not to leave the order for the parties to draft separately. At the same time, he stated that there should be a separate document requirement for a final judgment. Judge Shaughnessy suggested that the origin of this problem was that there was not sufficient discipline with respect to the title of documents—if a final order were always titled as a judgment and a decision that the judge did not intend to be complete were always titled as a memorandum decision, this problem would not exist.

Mr. Battle gave three reasons in support of the first approach. First, as it is consistent with the current case law, it would likely be easier for it to get approval from the supreme court. Second, the consequences of an error in determining whether an order is complete are less severe for this option than under option two. Third, the first option was consistent with current practice—most orders are prepared by counsel and so would not be affected by the adoption of option one.

With respect to Mr. Battle's first reason, Judge Shaughnessy observed that the supreme court's holding in *Code* and its progeny was meant to protect the right to appeal a final judgment when finality was unclear. If the committee were to propose option two along with a strong separate document requirement that achieved the same goal, the supreme court would likely have less of an issue about making the change. Judge Blanch added that the supreme court was working with the language of the rules as they were at the time, and there's no reason to think that the court believes that *Code* represents an ideal solution to the issue of surprise finality and would not be open to a different solution to the problem.

With respect to Mr. Battle's second reason, Judge Shaugnessy pointed out that if a party erroneously interprets a complete order as incomplete under the second option, the most that would happen is that it would lose its rights to file an interlocutory appeal. That is not very significant, as a party always has the ability to file an appeal from the order when it has merged into a final judgment.

With respect to Mr. Battle's third reason, Mr. Shea responded that, as written, the requirement of including language that no further order was required would apply to both judge-drafted and attorney-drafted orders. Mr. Whittaker noted that either way, this would be undesirable: if attorney-drafted orders were presumptively complete while judge-drafted orders were presumptively incomplete, it casts doubt on the validity of an order drafted by an attorney and subsequently edited by a judge—how much editing does it take to change an order from being drafted by a party to being drafted by the judge? However, if we were to require attorneys to include the magic language, we would be multiplying the incomplete order problem that currently exists and would have to educate not only the bench about the magic words, but also the bar. Finally, Judge Blanch observed that the reason that most orders were drafted by attorneys was that most decisions are announced orally from the bench.

Committee Action. After some discussion, it was the general sense of the committee that so long as there was a requirement for a judgment to be entered as a separate document as per the federal rule, an order signed by the judge should be presumed to be complete unless there is an express direction for some further action. Mr. Battle thanked the committee for its direction and expressed the subcommittee's attention to deliver a final proposal for the committee's consideration soon.

V. RULE 30

Mr. Hafen next invited Mr. Shea to lead a discussion on the proposed revision to Rule 30 that was introduced by the Utah Court Reporters Association ("UCRA") at the meeting of January 22, 2014.

Discussion. Mr. Shea suggested three changes to the rules for the committee to consider. The first change would be to specify in Rule 30(b)(2) that a deposition recorded by stenographic means must be recorded by a certified court reporter as defined by Utah Code § 58-74-102. He noted that this appears to be the universal practice, and that the amendment would simply be restating the status quo. Second, Mr. Shea recommended deleting the second sentence of Rule 30(f)(3), as it refers to a transcription process that is only available for transcribing recordings made on the audio recording systems of the district and juvenile courts. As such, it does not make sense and should be deleted.

Finally, regarding the UCRA's proposal to require a transcript of a deposition recorded by non-stenographic means to be prepared by a certified court reporter, Mr. Shea noted that his research on the issue indicated that Utah courts have not required that deposition transcripts be from certified court reporters for many years, and this would be a significant change in Utah law. However, if the committee wanted to consider this proposal, Mr. Shea recommended amending Rule 32(e) to require a transcript provided to the court to be transcribed by a certified court reporter as defined by Utah Code § 58-74-102. He cautioned that before the committee adopted this amendment, it would be wise to hear from the representatives of videography firms and similar businesses.

Mr. Carney argued that one of the purposes of the committee was to promote the inexpensive determination of civil actions. So long as there are assurances that a transcript is accurate, the committee should not add requirements that are likely to make the process more expensive. Mr. Carney also pointed out

that making a transcription from a recording does not require the degree of qualification that making a stenographic recording of a deposition in real time does, and therefore a party should not be required to pay the price premium associated with a court reporter's skills and training. Determining the qualifications of a transcriptionist in terms of training, accuracy, and professional responsibility is the purview of the legislature, and the committee should defer to its judgment on the matter. On the other hand, the court or a party should not have to listen to the recording in order to verify the accuracy of a transcript—there needed to be some sort of certification of the transcript's accuracy.

Mr. Whittaker noted that under Rule 28, a deposition must be taken before an officer authorized to administer oaths and take testimony. In the context of a deposition recorded by non-stenographic means, that officer's responsibility would include keeping custody of the recording and verifying the accuracy of any transcription made against the recording in his or her possession. After he or she has done this, the officer should certify the accuracy of the transcript. Mr. Shea added that the parties and the court are relying upon the accuracy of the transcript regardless of whether it is prepared from a recording or from stenographic notes. At least when a party has a recording, there is a way to independently verify the accuracy of the transcript.

Mr. Smith argued that so long as the deposition notice included information about the means of recording and the officer taking the deposition as required by Rule 30(b), the parties should be able to sort out the details among themselves. Mr. Slaugh added that he had heard reports where a party would not share the recording with the opposing party. Other members pointed out that under Rule 30(f), the officer taking the deposition has to keep a copy of the record and furnish it to a witness or party upon payment of reasonable charges.

With respect to the proposal to amend to Rule 30(b)(2) to state that a deposition recorded by stenographic means must be recorded by a certified court reporter as defined by Utah Code § 58-74-102, Mr. Whittaker noted that this requirement was already covered by the Certified Court Reporters Licensing Act (Utah Code Ann. § 58-72-101 *et seq*.). Section 301 of the Act requires a license to engage in "the practice of court reporting," which is defined in the Act as "the making of a verbatim record of any . . . deposition, . . . or other sworn testimony given under oath." While DOPL ruled that preparing a transcript from a recording was not the practice of court reporting, recording a deposition by stenographic means most certainly is the practice of court reporting.

Committee Action. It was moved and seconded that the committee take no further action on the proposals to amend 30(b)(2) and 32(f) and on the proposal to require a transcript of a deposition recorded by non-stenographic means to be prepared by a certified court reporter. The motion carried unanimously by voice vote.

It was further moved and seconded that Rule 30 be revised as follows:

- Paragraph (f)(3): delete "An official transcript of a recording made by non-stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e)."

The motion carried unanimously by voice vote. The proposed revision to Rule 30 was thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

VI. RULE 37

The committee next considered the proposed revision to Rule 37. This proposal had been tabled in the February 2014 meeting in order to prepare a draft for review that addressed the concerns raised at that meeting.

Discussion. Mr. Shea summarized the major changes made from the previous draft as follows:

- Subdivision (a), which explained the grounds for seeking an expedited discovery motion, was revised to remove the specific grounds for compelling discovery and was merged into paragraph (1) of former subdivision (b);

- Subdivision (c), which provided for specific protective orders, was merged into paragraph (7) of former subdivision (b);

- Subdivision (d), which provided for an award of costs and attorney fees upon a showing of bad faith or lack of substantial justification, was merged into subparagraph (7)(H) of former subdivision (b);

- The term "expedited discovery motion" was replaced with "expedited statement of discovery issues," and the wording of the procedure was changed to remove any language of motion practice;

- “Engag[ing] in outrageous behavior during discovery” was added to “fail[ure] to follow a court order” as grounds for seeking sanctions under former subdivision (e); and

- Subdivision (h), which precluded a party from using a witness or item of evidence that was not timely disclosed, was removed and an advisory committee note was added to explain that it was removed because “the effect of non-disclosure is adequately governed by Rule 26(d) and the process for resolving disclosure issues is included in paragraph (a).”

Mr. Shea further noted that the Utah Court of Appeals recently ruled in *Pointe Meadows Owners Association v. Point Meadows Townhomes*, 2014 UT App 52, ¶ 14 (mem.), that exclusion of untimely disclosed witnesses and evidence is not an affirmative sanction, but rather occurs automatically by operation of law unless affirmative relief is granted by the district court upon a showing of good cause. It would therefore be appropriate to remove subdivision (h) from the rule entitled “Discovery Sanctions.”

Judge Pullan pointed out that there were two subparagraphs labeled (a)(7)(H) and that the second one should be (K). Professor Davies noted that there was an extra “the” on line 154. Mr. Slaugh asked whether the language of lines 105–110 should be more explicit about ordering the party, witness or attorney to pay costs and attorney fees. Other members agreed and noted that the phrasing of that subparagraph was not consistent with the previous subparagraphs in the list.

Judge Pullan suggested changing the language “engages in outrageous behavior during discovery” in line 126 to “engages in willful, bad-faith, or persistent dilatory tactics frustrating the judicial process.” This language would match the standard applied by case law. *See Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 9, 235 P.3d 791 (“Before a trial court can impose discovery sanctions under Rule 37, the court must find on the part of the noncomplying party willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process.”). Mr. Whittaker expressed his concern that applying sanctions to conduct other than failure to follow an order would be a substantial change, and it may be better to rely upon the court’s inherent authority to impose sanctions for bad-faith, dilatory, or vexatious conduct. Judge Pullan responded by saying that case law already applies discovery sanctions to such conduct, so it would not be a substantial change in existing law.

Judge Shaughnessy suggested that the language "Unless the court finds that the failure was substantially justified" be restored to the draft. This language has been interpreted in case law to apply the requirement to find willfulness, bad faith, fault, or persistent dilatory conduct before entering discovery sanctions. If the language is kept, the case law applying the standard will be kept along with it.

Mr. Battle asked if the rule on expedited statements of discovery issues prohibits filing a motion to compel under Rule 7. Several members responded that it prohibited making a request for relief with respect to the listed discovery issues except by proceeding in accordance with the expedited procedures. Mr. Battle noted that the language in paragraph (a)(1) that a party "*may* request" might be ambiguous on that point.

Mr. Whittaker expressed his concern that the proposed draft has removed the statement of grounds for seeking an order to compel and a protective order that are subdivisions (a) and (b) of the existing version of the rule. He was especially concerned about the removal of the provision that the party seeking discovery has the burden to prove proportionality. Mr. Shea noted that the current list of grounds for seeking an order to compel is illustrative, not exhaustive. In addition, the proposed rule includes a list of protective orders in paragraph (a)(7), and the burden-of-proof provision is still in Rule 26(b)(3).

Mr. Slaugh noted that there was not language regarding the purpose for entering a protective order, namely, "protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2)," and recommended that the language be restored to lines 75–77. Judge Shaughnessy agreed that this language needed to be restored, but otherwise was of the opinion that the current draft adequately expressed the standards for compelling discovery or entering a protective order. The committee must be careful to remove any suggestion that a motion under Rule 7 to compel or for a protective order is appropriate.

Mr. Whittaker asked the committee whether a "statement of discovery issues" was really the best term to use. As the expedited discovery process was a request for an order, it fits the definition of a motion. Calling the paper to be filed a "statement" also leads to odd and stilted language in the rule—for example, lines 54–55 currently read: "if the *statement* requests extraordinary discovery, [it must include] a *statement* certifying that the party has reviewed

and approved a discovery budget." While he understood that the committee wanted to avoid any hint that a motion under Rule 7 would be in order, he suggested that using a synonym of motion such as "application" may be preferable. Judge Shaughnessy responded that when the UCJA provision was first drafted as a rule for the Third District, he had coined the term "statement of discovery issues." He later advocated changing the term to something else, but he could not convince his fellow judges. Judge Pullan added that he was one of the judges that Judge Shaughnessy failed to convince, and that the term was working to ensure that these types of issues were not brought as Rule 7 motions.

Committee Action. It was moved and seconded that Rule 37 be revised as proposed in the proposed revision contained in the meeting materials, incorporating the following amendments:

- Lines 54–55: replace "a statement certifying that" with "a certification that"
- Lines 75–77: Restore the words "or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression or undue burden or expense, or to achieve proportionality under Rule 26(b)(2),"
- Line 105: replace "(a)(7)(H)" with "(a)(7)(K)"
- Lines 105–110: change the wording to be consistent with the phrasing of (a)(7)(A)–(J), and to clarify that the court may order a *party, witness, or attorney to pay* costs and attorney fees.
- Lines 123–27: remove the underlined words in lines 125–27 and restore the following language (with the stricken words omitted): "Unless the court finds that the failure was substantially justified, the court ~~in which the action is pending~~ may impose appropriate sanctions for the failure to follow its orders, including the following:"
- Line 154: delete "The"

The motion carried unanimously on voice vote. The proposed revisions to Rule 37 were thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

VII. ADJOURNMENT

Mr. Hafen noted that as presently scheduled, the next meeting conflicts with a conference for the district court judges at Bryce Canyon. Because of the plan to discuss the pilot program at the next meeting, Mr. Hafen asked if it would be better to hold the next meeting a week later than currently scheduled. The committee generally agreed to moving the date of the next meeting. The committee adjourned at 6:02 p.m. The next meeting will be held on April 30, 2014 at 4:00 p.m. at the Administrative Office of the Courts.