UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – April 22, 2015

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

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

Jonathan Hafen welcomed the committee and invited comment on and a motion to approve the minutes. Terri McIntosh so moved and the minutes were unanimously approved.

II. Report on action by the Supreme Court on Rules 5, 7, 54, 56 and 58A. [Tab 2]

Mr. Hafen reported on the meeting with the Supreme Court. The Justices expressed their appreciation for the work of this committee. The Court approved as submitted Rules 5 and 54, and approved Rules 56 and 58A with slight phrasing changes. The Court removed a portion of the proposed committee note to Rule 56.

As to Rule 7, Mr. Shea had originally suggested that the rule address new evidence included in reply memoranda. The committee decided not to change the rule, but the Supreme Court has directed the committee to address the issue. Mr. Shea makes the same suggestion, which is reflected on page 10, lines 79-85. The change provides for an objection and response if new evidence is contained in the reply memorandum.

Discussion:

- Ms. McIntosh indicated that the change would be clearer if the second sentence came first.

- Mr. Andreason suggested that the clause "the moving party may file a response" in the third sentence be moved to the first sentence. The first sentence would then provide that if a reply memorandum includes new evidence, the nonmoving party may file an objection within 7 days and the moving party may file a response within 7 days. He proposed cutting the rest of the third sentence. Ms. Anderson seconded Mr. Andreason's proposal.

- Mr. Hafen invited a motion to approve Rule 7 with Mr. Andreason's proposed changes to Mr. Shea's addition. Ms. Anderson seconded and the motion carried.

III. Post-Trial Motions. Rules 50, 52, 59 and 60. Technical amendments to Rule 6. [Tab 3]

Frank Carney explained that his proposed changes to the post-trial motion rules were intended to be stylistic, such as getting rid of antiquated terms and names of motions, and to bring the rules into alignment with the federal rules. The changes also increase the deadlines for filing post-trial motions from 14 to a more realistic 28 days. Mr. Shea took Mr. Carney's proposals and reworked the post-trial motion rules to adopte much of the federal language.

Discussion:

- Rule 60. Mr. Shea discussed his efforts to conform the rule to the federal language. Mr. Andreason suggested the addition of a comma after "while the appeal is pending" in the last sentence of Rule 60(a).

- The committee further discussed the proposed changes to Rules 52 and 59.

- Mr. Carney identified the proposed changes to Rule 50 at page 44, line 55. As it stands, the rule does not identify the grounds for obtaining a judgment as a matter of law; it is based entirely upon case law. We therefore need to be careful in amending the rule, but the proposed change adds the grounds from the federal rule. We may also want to add a committee note similar to the federal comment from 1991.

- Mr. Carney clarified that in addition to stylistic changes, a material change to the rule is being proposed: the current requirement to renew a motion for directed verdict at the close of all evidence is being removed as it was from the federal rule. Otherwise, as it currently stands, if the motion is not made at that time, the party waives the right for a judgment notwithstanding the verdict—an unfair "gotcha." Mr. Carney suggested a committee note on that issue as well. Judge Toomey mentioned that a motion for directed verdict at the close of all evidence is unnecessary. Mr. Carney also proposed a change to the deadline for the motion from 14 to 28 days. Ms. Anderson and Mr. Bell expressed their agreement with the deadline change. Mr. Hafen invited a motion with respect to the proposed changes to Rule 50. Judge Toomey so moved with respect to the changes, and with a committee note. Ms. Anderson seconded. All approved the motion.

- Mr. Shea will include all of the discussed rules next month, except for perhaps Rule 6. The focus will be on Rule 52.

III. Rule 63. Disability or disqualification of a judge. [Tab 4]

Mr. Shea reported that there have been three separate suggestions to amend Rule 63: first, whether a second or subsequent motion should be allowed under some circumstances; second, whether an express prohibition against a response is needed; and third, whether to incorporate grounds for disqualification identified in federal statutes.

Discussion:

- Judge Shaughnessy commented that the first proposed change is based on the *Dahl* case, where the judge was challenged multiple times. Parties, however, do have an available

remedy. The judge has the discretion to consider more than one motion, and parties have the right to seek review through mandamus, etc. No matter what the committee decides, the rule will not change the requirements of the Code of Judicial Conduct; the judge is required to raise potential disqualification issues even if the parties do not.

- Regarding the second issue, Ms. Anderson asked why no response to a motion for disqualification is allowed. Mr. Shea said that the only options are for the judge to grant the motion or send it to a reviewing judge. Judge Toomey commented that motions to disqualify go only to the judge's knowledge and bias, so a response from the other party wouldn't be proper. Scott Bell also mentioned that a response would be simply gratuitous—the other side supporting the judge. Mr. Shea reported that the criminal rule has already been changed to reflect that no response is permitted. Judge Blanch mentioned that the reviewing judge is permitted to go to the certifying judge for information. Judge Shaughnessy and Mr. Shea commented that the certifying judge is not permitted to volunteer any information unless the reviewing judge invites a response.

- Mr. Shea also added a provision that informs parties to submit requests for decision with their motions to disqualify, as that is the mechanism to bring a motion to the judge's attention. Judge Toomey commented that it is particularly important on motions to disqualify, as the court may be taking action on the case without realizing that a motion to disqualify is pending.

- Mr. Hafen raised the third proposed change to Rule 63, which is to incorporate the grounds for disqualification that are found in 28 U.S.C. § 455 (page 56, lines 37-53). Judge Baxter commented that the proposed change takes poorly drafted language from the federal statute and puts it where it doesn't need to be. Utah already has the Code of Judicial Conduct. Mr. Shea stated that he had attempted to incorporate the proposal using simpler language than the federal statute, but he believes "legally sufficient" found in line 34—which is in the current rule—is enough. Several committee members commented that all of this is already contained in the Code of Judicial Conduct and should not be incorporated into Rule 63.

- Mr. Andreason asked whether the committee should codify what "legally sufficient" means, and whether practitioners are to refer to the Code of Judicial Conduct and/or case law. Judge Shaughnessy commented that no articulation of the standard is necessary because the audience for the rule is judges against whom these motions are filed and the reviewing judges. Judges are well-trained on the issue and parties do not get to weigh in by opposing the motion.

- Mr. Andreason asked whether the Supreme Court had weighed in on line 22, i.e., "did not exist," and whether it should instead say "did not know and could not have reasonably known." Ms. Anderson mentioned that the same issue exists in subsection (b)(2)(C). Judge Shaughnessy suggested that the language be changed to reflect that successive motions are permitted on "new grounds." Judge Blanch asked how many motions to disqualify are really frivolous or tactical, as that may dictate how much the rule should encourage second motions. Committee members commented that frivolous motions have been a problem in the past, and are still common. Mr. Shea noted that we have not been directed by the Supreme Court to add a provision that permits successive motions; the Court has simply observed that the rules permit only one.

- Based on the discussion, Mr. Hafen questioned whether the committee wants to propose the change to permit successive motions. Mr. Andreason believes permitting further motions only upon grounds that "did not exist" before is too harsh and would prefer a "did not know and could not have reasonably known" standard. The committee discussed the prudence of permitting second motions and concluded that they should be permitted. With respect to the standard, Mr. Shea proposed that if the new language from subsection (b)(2)(C) is kept, the last sentence of (b)(3) concerning one motion could simply be deleted. Mr. Andreason commented that it might be difficult to discern what "should have known" means—will depositions have to be taken? Judge Shaughnessy explained that these motions are often filed at the last minute, which makes them hard to address by judges like Judge Anderson who do not have reviewing judges immediately available. Mr. Shea suggested adding a committee note regarding the *Dahl* case, wherein the Court stated that there may be situations where more than one motion is appropriate. As to "should have known," Judge Anderson commented that it means with the exercise of reasonable diligence. Ms. Anderson commented that "with the exercise of reasonable diligence" is probably unnecessary in subsection (b)(2)(C). Judge Anderson questioned whether the moving party should have the responsibility of addressing how they came to know of the information underlying the motion. Mr. Hafen agreed with the suggestion, proposing that facts supporting timeliness be added to the affidavit requirement in the rule. Mr. Shea will prepare a draft for review next month.

IV. Rule 8. General rules of pleadings. [Tab 5]

Mr. Shea explained the proposed changes to Rule 8, which include updating "contributory negligence" to "comparative fault," and changing all "shalls" to "musts." Mr. Andreason moved to accept the changes, Judge Blanch seconded, and all approved.

V. Rule 9. Pleading special matters. [Tab 6]

Mr. Shea reported that he received a request from a paralegal suggesting that Rule 9(k) might be incorrect given the Judgment Renewal Act. A lawyer from the firm sent a follow-up letter, suggesting that complaints or motions alleging failure to pay a judgment should require a copy of the judgment to be attached. Mr. Shea believes that makes sense, even though a motion is not technically a pleading.

Discussion:

- Judge Blanch asked when a complaint would be filed as opposed to a motion to renew a judgment. Ms. Anderson commented that a complaint is necessary if the judgment is not domestic. Judge Blanch observed that the Judgment Renewal Act governs all domestic judgments and Section 78B-5-302 establishes how to domesticate a foreign judgment. So Rule 9(k) should never be needed.

- After discussion the committee agreed that Rule 9(k) could be deleted, but that there should be a rule based on the Judgment Renewal Act giving parties directions. Mr. Shea will prepare a draft for the next meeting.

VI. Adjournment.

The meeting adjourned at 5:55 pm. The next meeting will be held on May 27, 2015 at 4:00pm at the Administrative Office of the Courts.