UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – October 28, 2015

Present:	Rod Andreason, Barbara Townsend, Terri McIntosh, Kent Holmberg, Jonathan Hafen, Amber Mettler, Leslie Slaugh, Judge Toomey, Judge Blanch, Steve Marsden, Lincoln Davies, Sammi Anderson, Judge Anderson
Telephone:	Trystan Smith, Lori Woffinden, Paul Stancil
Staff:	Timothy M. Shea, Heather M. Sneddon
Not Present:	Mag. Judge Furse, Judge Baxter, James Hunnicutt

I. Welcome and approval of minutes. [Tab 1] – Jonathan Hafen.

Jonathan Hafen welcomed the committee and invited a motion to approve the minutes. Judge Toomey so moved, and Terri McIntosh and Amber Mettler seconded. The minutes were approved unanimously.

II. Consideration of comments to Rule 43 (Evidence); and Rule 55 (Default). [Tab 2] – Tim Shea.

Tim Shea reported that Rule 43 was published for comment in the last batch. No comments were received, but comments on its juvenile counterpart were submitted that expressed the preference for continuing to allow telephone hearings, which are a common feature in juvenile court. The Code of Judicial Administration requirement for advanced audio-video conference are being eliminated. Courtrooms are still being retrofitted with the technology, but there is a concern that if the rule describes specific technology, judges may not be able to use anything else even if a telephone conference would be sufficient. Mr. Shea has modified lines 19-24 of the committee note accordingly.

Discussion:

- Leslie Slaugh suggested that paragraph 2 be omitted, as the rest of the note explains the preference for live testimony. Paragraph 2 will be out of date very soon. Judge Toomey supported the paragraph's deletion. Mr. Hafen suggested that paragraph 2 be less specific to say, e.g., as technology evolves, needs may change. Just because certain technology isn't available doesn't mean you can't testify remotely. Mr. Slaugh and Barbara Townsend agreed. Mr. Slaugh commented that lines 20-21 express worthy goals, and although they will not be achieved through telephone conferences, at least all participants can be heard. Mr. Shea will amend the note to be less specific. James Hunnicutt suggested that citations be included, which Mr. Shea will add. Judge Toomey moved to send Rule 43 to the Supreme Court with the revisions discussed by the committee, and Mr. Townsend seconded. All approved.

Mr. Shea informed the committee that Rule 55 was adopted by the Supreme Court on an expedited basis and therefore, is currently in effect. The issue was that clerks were entering default judgments without sufficient evidence of a "sum certain." The new rule requires a verified petition or an affidavit to support a claim of damages at the default stage. Mr. Shea provided a summary of the comments and his recommendations.

Discussion:

- Leslie Slaugh asked whether the new rule requires that affidavits meet Rule 56(e) standards. As written, it appears to be enough for a party to declare entitlement to a sum certain with no supporting evidence. Mr. Shea was not involved in the development of the new rule, but indicated that the Supreme Court wants clerks to be able to enter as many default judgments as legally permitted provided there is sufficient proof of the claim for damages. When a party defaults, liability is automatically established but damages are not.

- Judge Blanch commented that he believes the new rule strikes the right balance of requiring verification concerning damages without asking the court or the plaintiff's lawyer to do more on the defendant's behalf than the defendant did. Steve Marsden said that, in his experience, it is not that difficult to get default judgments set aside and he questioned whether it will be more difficult with the new rule. Mr. Slaugh said that there may be additional grounds to set aside if the affiant doesn't have adequate facts to establish the amount of the claim.

- The committee agreed that the rule should include declarations as well as affidavits. Rod Andreason suggested that "under penalty" be removed and the statute be cited. Mr. Marsden so moved and Sammi Anderson seconded. All approved.

III. Rule 9 (Pleading special matters); Rule 26.02 (Disclosures in personal injury actions); and Rule 58C (Motion to renew judgment). [Tab 3] – Tim Shea

Mr. Shea reported that the primary purpose of the Rule 9 changes is to delete paragraph k. The remaining revisions are largely in conformity with Fed. R. Civ. P. 9's effort to simplify language. There are a couple of state provisions, however, for which there is no federal counterpart. Rule 26.2 contains a conforming amendment on line 42. The committee's requested changes to Rule 58C have been made. Mr. Shea believes these rules are ready to send out for comment.

Discussion:

- Mr. Slaugh suggested that line 20 of Rule 9 be changed to "must state with particularity." Judge Toomey moved to send all rules out for comment with Mr. Slaugh's suggested change to Rule 9. Kent Holmberg and Ms. Townsend seconded. All approved. Mr. Shea noted that the blue underlined language in the rules will be active links when posted on the court website.

IV. Report of joint committee on the effect of post-judgment proceedings on time to appeal. [Tab 4] – Rod Andreason, Amber Mettler.

Mr. Andreason reported that the committee met 2-3 times to discuss. Ms. Mettler commented that Mr. Shea's memo is very comprehensive. What started as a narrow assignment from the Supreme Court to evaluate whether certain post-trial motions should toll the time to appeal evolved to include many other things, including the timing for filing motions for fees, etc. The committee discussed what made sense from a policy perspective. The committee decided to adopt the federal rule that motions for fees do not toll the time for appeal, and added language to Rule 74 on the timing for filing fee motions.

Discussion:

- Mr. Slaugh said that the new rule may avoid the dismissal of premature appeals, but results in a default situation of two appeals: one on the merits and one on attorneys' fees. Many court decisions emphasize that the appellate court does not want piecemeal appeals. Mr. Shea said in that circumstance, the appellate court would likely consolidate the appeals. Ms. Mettler commented that the committee decided to include a time limitation on filing motions for fees to help assuage that issue. Mr. Shea said that the Supreme Court has made clear that it does not have a preferred outcome on this issue; it wanted a group to independently examine the state and federal systems and to make a recommendation. The work committee has concluded that the federal system is an improvement.

- Mr. Slaugh expressed his concern that the amended rule introduces a new level of uncertainty regarding how a judge will exercise his or her discretion in determining whether to keep the attorneys' fees component with the main case. Mr. Shea explained that a party files its appeal within 30 days of the original judgment. If the trial judge will not extend the time to appeal to address a motion for attorneys' fees, then the party files a notice of appeal. If the trial judge extends the time, then under operation of Utah R. App. P. 4, the notice becomes effective when the judgment on attorneys' fees is entered. Ms. Mettler also commented that the discretion is the same under the federal system. Mr. Slaugh responded that the new rule will require payment to file the notice of appeal that often would not be needed. The committee discussed piecemeal appeals on substantive issues versus attorneys' fees, whether the new rule may expedite lower court decisions on motions for fees, and whether the new rule virtually mandates attorneys to pay for and file notices of appeal in the absence of a court order extending the time to appeal to address a motion for fees.

- Judge Anderson commented that he would not want parties to file a notice of appeal; he would prefer to address the motion for fees first. Committee members discussed whether the rule should presume that the attorneys' fees issue will stay with the main case, or whether awaiting a decision on a motion for fees works to delay appeals on liability.

- Mr. Shea acknowledged the committee's competing views on the rule. Before it can be sent out for comment, we need the concurrence of two advisory committees and the appellate rules committee has not yet discussed it. Several committee members expressed their view that the rule is the result of hard work and should be sent out for comment.

- Mr. Slaugh commented that the new rule will delay appeals upon the filing of certain Rule 60 motions, which would now be permitted up until 28 days after the judgment was entered. Mr. Slaugh also raised the issue that under the current rule, attorneys' fees sanctions are appealable only at the end of the case. He believes the new rule retains that, but there is a gap in the rules as to whether those are immediately enforceable. Normal interlocutory judgments are not. He suggested that the committee may want to address that issue. Mr. Marsden suggested that the issue be carefully considered; from a judge's perspective, he or she may be trying to compel some behavior through a monetary sanction, but if it can't be enforced prior to appeal, it has no compulsive power. Ms. Mettler said that nothing the work committee did would change that—it has not been addressed.

- Judge Blanch presented the following scenario: He is sued and loses, and appeals under the new rule. While the appeal is pending, attorneys' fees are assessed against him. He doesn't appeal the fees decision. Then he wins on his appeal of the main case. Does he have to pay

the attorneys' fees judgment because he didn't appeal that portion, or is that taken care of? Intuitively he thinks it should be taken care of, but how so under the rules? Ms. Mettler responded that the process for getting a fee award to be enforceable is to amend the judgment. At some point, there is only one viable judgment, which is amended when fees and costs are added. The entitlement to fees is based on the validity of the first judgment. Judge Blanch said that he is unsure of the answer, but if parties have to file a second appeal, are we achieving efficiency? Judge Toomey commented that there should be an automatic basis for vacation of the fee award in that instance. Mr. Marsden said that in his experience, fees awards are always an amendment to the judgment. If it is all part of one judgment and that judgment is vacated on appeal, great. But if a second appeal of the fees award is required, then this rule doesn't provide a benefit. Ms. Anderson commented that the practical effect will be that everyone will file a notice of appeal on the fees award. Fees and costs should be added after the fees motion is decided, but there is still the question of whether the original notice of appeal should be amended or a second notice of appeal should be filed. Mr. Hafen asked whether the existing proposal needs to be clarified to deal with this scenario, and whether Rule 54(e) sufficiently addresses it. The committee discussed whether a note should be added to make it clear.

- The committee discussed publishing as a package Utah R. App. P. 4, and Utah R. Civ. P. 54, 58A and 73. With respect to Rule 73, Ms. Anderson commented that she likes the imposition of a deadline for filing motions for attorneys' fees, but wonders whether 14 days is too tight. Lincoln Davies raised Judge Blanch's concerns on how to address an attorneys' fees award after a notice of appeal has already been filed and whether an advisory committee note on that issue is in order. Utah R. App. P. 4(b)(2) includes attorneys' fees, so it appears that you would have to amend your notice of appeal. Mr. Slaugh agreed.

- Mr. Davies moved that the rules be sent out for comment with a note added, as discussed. Judge Toomey seconded. Given the importance of the note, Mr. Shea asked whether the committee would like to review a draft. Mr. Marsden said that we have to wait for the appellate rules committee to address Utah R. App. P. 4 anyway. Mr. Shea will draft a note for consideration at the next meeting. All approved the pending motion to send the rule out for comment with the note, in concept.

V. Rule 55 (Default). [Tab 5] – Tim Shea

Mr. Shea told the committee that a majority of the Supreme Court justices would favor an amendment to the rules to incorporate Standard 16 of the Standards of Professionalism and Civility encouraging notice of impending default judgments before seeking the entry of a default judgment. The topic was on the agenda 5 years ago, but the committee did not reach it and has not returned to it. If the committee is in favor of an amendment, Mr. Shea recommends against treating represented parties better than self-represented parties.

- Judge Anderson commented that when you have a lawyer on the other side, you know that you have someone who cares enough to do something about a default judgment. If you don't, you may just have a defendant sitting there who won't do anything. He would not favor imposing another step to give notice after service that in fact the defendant must do something to avoid default.

- Mr. Slaugh questioned whether notice should be given in the summons that a default will be requested if no response is filed. He has seen cases where the parties discuss the case after

service, the defendant believes it is resolved and the plaintiff obtains a default judgment. He can see the point of requiring further notice in that situation, but it would be difficult to implement. Judge Anderson responded that it is one more fact the court has to decide. On a motion to set aside, if there was a conversation and the judge believed there was any chance of miscommunication, the judgment would be set aside. Mr. Slaugh said that sometimes the situation arises after 3 months have passed.

- Judge Blanch said that this is a situation where an easy case makes a bad rule. Ninety percent of these cases are collection cases with no representation. He does not see how this rule is workable given how things actually run at the trial court level. Mr. Shea responded that perhaps it's not workable, but if it becomes a rule, he recommends against making a distinction between lawyers and parties because it puts the Court in a bad light. Judge Blanch recommends against the rule. No one hires a lawyer to get defaulted. In the garden variety default case the defendant has rolled over, and imposing additional rules requires too much of plaintiffs. Judge Toomey agreed. Judge Anderson commented that the rule requires you to call lawyers but not unrepresented parties, which looks bad. Judge Blanch said it belongs in the Standards of Professional Conduct.

- Mr. Marsden asked what the practical effect would be of making it a rule. Mr. Shea said we would have to assume that the Court anticipated a separate communication other than paragraph 3 of the summons. Mr. Hafen said that it doesn't feel like a rule; it feels more like practice pointers and acting in good faith. Mr. Davies commented that it is analogous to a Rule 11 requirement, and the same as the Rule 37 requirement to confer in good faith. Mr. Marsden said that it is just another box to check in collection cases.

- Mr. Hafen suggested that we raise the issue with the Court to determine if it is still interested in amending the rules in this fashion. Judge Toomey recommended that we inform the Court that the general sense of the committee is that it is not a good idea. Mr. Andreason said that the exceptions could drown the rule. Mr. Hafen will communicate the committees concerns about the rule to the Court.

VI. Rules 15 and 13. [Tab 60] – Tim Shea

Mr. Shea reported that, in a concurring opinion by Justice Voros, he requested that the committee amend Rule 15 to incorporate the provisions of Fed. R. Civ. P. 15(c) regarding the relation-back of an amended pleading when the amended pleading adds a new party. Mr. Shea has drafted an amendment. The main amendment to Rule 13 deletes the paragraph regarding omitted counterclaims. In that circumstance, the party would seek leave to add a counterclaim under Rule 15. All other amendments adopt the simplified text of the federal rules.

Discussion:

- Mr. Hafen commented that he thinks these make sense for Rule 15. Mr. Davies asked whether there are Utah cases dealing with adding parties and relation-back. Mr. Slaugh said that the problem with the cases is that they rely on a decision under the Judicial Code of Administration that has since been repealed. Mr. Davies likes the idea of the Rule 15 amendment. The federal rule is clear and there are federal cases on it.

- Mr. Slaugh commented that Rule 15(a)(1)(A), lines 6-9, make a substantive change to the rule. Under the old rule, you can't amend after the other party has responded; under the new rule, you can. Mr. Shea said the change makes it parallel the federal rule.

- Kent Holmberg commented that line 47 regarding notice to the attorney general may present some issues that he needs to explore. Lines 49 and 50 discuss where process is to be delivered, but there are specific state statutes addressing that. Mr. Shea said this simply replaces the Utah counterpart to the U.S. attorney. On the relation-back issue, Mr. Holmberg said the main difference between the federal and state systems is that in the federal system, the question becomes how related the new party and the served party are. Utah courts look at whether they have the same legal interest. Mr. Davies said that under the federal system, the new party must have known of the lawsuit within the summons period and must have known that they would have been named unless there was a mistake by the plaintiff. It is narrower; it forces the plaintiff to figure out who they need to sue and to sue them. Mr. Hafen commented that it is important to consider relation-back in the context of Rule 1 and trying to move cases along. Mr. Shea said that if he understands Justice Voros correctly, Voros believes the federal policy is a better policy, not just that they have it codified.

- Hearing a general consensus, Mr. Shea suggested that Rule 15 be sent out for public comment and that Rule 13 be addressed next time. Mr. Marsden so moved and Judge Blanch seconded. Mr. Holmberg said that he may have some suggested changes regarding the notice to the attorney general provision. Mr. Hafen requested that Mr. Holmberg provide any suggested changes and that that piece be taken up by the committee in the next meeting with Rule 13. All were in favor of the motion.

VII. Adjournment.

The meeting adjourned at 5:35 pm. The next meeting will be held on November 18, 2015 at 4:00pm at the Administrative Office of the Courts.