UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – November 18, 2015

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

I. Welcome and approval of minutes. [Tab 1] – Tim Shea.

Tim Shea welcomed the committee and invited any amendments to the minutes or a motion for approval. Judge Toomey moved to approve the minutes and Paul Stancil seconded. The motion carried.

II. Rule 26.3 Disclosure in Forcible Entry and Detainer Actions.

Mr. Shea welcomed attorneys Martin Blaustein, Jacob Kent and Holly Petersen to the meeting to discuss their proposal to adopt Rule 26.3 in landlord/tenant cases. They represent tenants in landlord/tenant disputes, covering approximately 2/3 of the State.

Mr. Blaustein presented to the committee on the reasons for adopting Rule 26.3. Plaintiffs do not have to serve initial disclosures until 14 days after an answer is filed. In landlord/tenant disputes, the occupancy hearing is generally in less than 10 days, and unless the case proceeds after that, the tenant is unlikely to receive discovery from the plaintiff. In Mr. Blaustein's experience, if the landlord is claiming that rent is owed, there is no disclosure in the complaint regarding the calculation. In criminal nuisance cases, the tenant likewise does not know the specifics of the allegations. This information is critical to a successful defense. Under the current system, tenants must defend themselves without crucial information when the consequences may include treble damages and yet the landlord is under no obligation to disclose evidence or information regarding damages upfront. Mr. Blaustein proposed Rule 26.3, which would require landlords to serve initial disclosures with the complaint and, because tenants may not otherwise know that they must also submit initial disclosures, to provide tenants with notice at the time of service that they must also serve initial disclosures when they file their answer.

Discussion:

- Leslie Slaugh commented that if tenants are unlikely to comply with the initial disclosure requirement we don't want that failure to hold up the answer. He asked whether tenants should be given additional time to submit initial disclosures. Mr. Blaustein responded that the problem is tenants have only 5 business days to answer, and the parties could have a trial before 5 more days have passed. Magistrate Furse suggested alternatively making the tenants' deadline 24 hours before the occupancy hearing. Judge Blanch commented that in his practice, only possession is addressed at the occupancy hearing and usually the tenant will

admit that he/she is behind on rent. How much is owed is decided later. Mr. Blaustein said most courts have a similar practice, but some try to resolve the entire case at the first hearing and will take testimony on damages. In addition, he noted that sometimes notices are defective. Judge Anderson commented that he determines only whether rent has been paid at the occupancy hearing. If it hasn't, possession usually goes to the landlord. Judge Blanch can recall dozens and dozens of these hearings, but only 4 or 5 where a full evidentiary hearing was conducted in the beginning where the defendants would have benefitted from more time. In his experience, tenants typically don't disagree with the amount owed, and it is a burden on landlords to require initial disclosure information with the complaint.

- Mr. Slaugh noted that under the current proposal, the landlord still has to make the disclosure even if the tenant defaults. Judge Anderson said the majority of these cases go by default, and in most of the remaining cases, the defendants don't present much of a defense. This proposal imposes an obligation upfront on 100% of cases. Terri McIntosh asked whether the landlord would be required to produce documents as well, since only a small number of cases would seem to benefit. Judge Blanch asked whether tenants are sufficiently protected if they deny that they owe what the landlord claims is owed, since the landlord bears the burden of proof. Mr. Blaustein responded that oftentimes what is included in the definition of "rent" is the issue. Some practitioners and landlords take the position that anything owed is "rent," including property damage, interest, attorney fees, etc. This is important because a pro se tenant may not be able to see the distinction, and what amount is subject to trebling under the statute is of paramount importance. Mr. Shea commented that it may be difficult to draw conclusions about the value of early disclosure from the way things are now, because currently tenants are making decision in a vacuum.

- Ms. McIntosh asked whether something more modest would be sufficient, i.e., that the landlord provide a computation of claimed damages in the complaint. If there is a subsequent hearing, documents will be produced. She said that landlords are likely to complain that serving initial disclosures with complaints is a significant burden when the majority of cases result in default. Judge Anderson commented that there seems to be a consensus that landlords provide more information on the calculation of amounts owed. The question remains as to whether full initial disclosures up front should be required. Judge Toomey suggested the development of a form complaint that includes the damage requirements. Judge Blanch said that Mr. Blaustein's concerns are legitimate, but in his experience, the number of unlawful detainer hearings where upfront disclosures would make a difference is a very small percentage. In most cases, the amount of the arrearage is not at issue at the occupancy hearing—if the tenant is in arrears, possession usually goes to the landlord. But the landlord is not excused from his burden to establish damages at trial. Paul Stancil said that if disclosures are made ahead of time, it will change the calculus for tenants on how (or if) they choose to defend the case.

- Judge Furse commented that tenants should receive a 3-day notice with the amount due if the issue is non-payment of rent. Other notices may be more difficult, such as for criminal nuisance. Holly Petersen explained to the committee that 3-day notices often are not specific enough to calculate what the landlord claims is owed. A total is included in the notice, but it could reflect several separate items. Likewise, when the landlord claims other lease violations and criminal violations, the notices are often vague. Recently, she handled a case alleging "suspicion of criminal activity." Her client was going into the hearing blind without sufficient

information to know what was being alleged. With more information up front, a tenant can make a decision on whether the issue is worth fighting, or try to minimize damages.

- Mr. Slaugh asked, if a notice to quit says the tenant owes $1000 but the tenant owed only $300, is the tenant still evicted? Even though they had no opportunity to cure with $300? Mr. Blaustein responded that under a 1928 Utah Supreme Court case, the court determined that less was owed than the landlord alleged and the tenant was given 24 hours to cure by paying the lesser amount. The problem, however, is that now there is the potential for having to pay attorney fees, court costs, late fees, etc. Judge Blanch suggested that rather than adopt Rule 26.3, the committee recommend that more specificity on damages be required in landlord eviction complaints. Judge Toomey reiterated that a form complaint with more specific damages would help.

- Mr. Shea commented that, if the committee's concern is that the landlord may not have immediate possession of some records, but would still want to introduce them at trial, the committee could specify what has to be included in the list of disclosures, including a calculation of damages and the lease. Judge Blanch said if he were a landlord, he would view the list of required disclosures under Rule 26 as quite burdensome to produce at the outset. One lawyer who does most of the eviction cases before him has a form complaint with blanks where he includes the degree of specifity Mr. Blaustein is requesting. Mr. Slaugh said that at least more detailed computation of damages should be included. Mr. Shea said that the Rule 26 exemptions do not currently include landlord-tenant evictions, but Judge Blanch commented that the cases are practically over by the time the disclosure requirement kicks in.

- Judge Anderson and Ms. McIntosh asked whether lawyers on both sides of these cases have discussed this issue. Ms. McIntosh proposed that Mr. Blaustein discuss the rule proposal with landlord attorneys and make a more specific recommendation on the disclosures needed to meet tenant needs. Mr. Slaugh asked whether commercial landlord/tenant cases should be excluded, since the expedited procedures don't apply to commercial tenants. Messrs. Shea and Blaustein indicated that the rule could probably be specific to residential tenants. Judge Toomey said it would be a good idea to defer a month to invite the main landlord attorneys to discuss the issue. While the committee is sympathetic to Mr. Blaustein's concerns, we do not want to create unrealistic burdens. Judge Furse also recommended that the Utah Apartment Association be involved and perhaps the folks at the Tuesday Night Bar. Mr. Shea also suggested including Mary Jane from the Self-Help Center.

III. Rule 4. [Tab 3] – Tim Shea.

The committee deferred discussion on Rule 4.

IV. Report on action by the appellate rules committee.

Mr. Shea reported that the appellate rules committee has approved their part of the joint effort to establish the effect of motions for attorney fees on the timeliness of a notice of an appeal under URAP 4. The subcommittee recommended adoption of the federal rule, which would have established that

motions for attorney fees have no effect on the finality of judgments but judges could order that the time for appeal does not begin to run until the final order on fees. The appellate rules committee, however, concluded that although a motion for fees should not affect finality and a judgment can be appealed while the motion is pending, the default should be that the time in which to appeal does not begin to run until the judge rules on the motion for fees. In essence, they recommended that the motion for fees be treated like the others in URAP 4, which will require a change to the proposed Rule 58A. Mr. Shea's recommendation is on page 47, i.e., that a motion for fees does not affect the finality of a judgment, but that the time for appeal runs from disposition of the motion.

Mr. Shea explained that the further amendment to Rule 54 is just the committee note to address Judge Blanch's concern and confirm that if a defendant does not appeal an attorney fee award but the judgment is overturned on appeal, the defendant is not liable for fees.

Discussion:

- Mr. Slaugh suggested that the scenario identified by Judge Blanch is not going to happen if the appellate rules committee's proposal on URAP 4 is adopted because the attorney fee issue will go up on appeal at the same time as the judgment. Ms. Mettler commented that if you appeal the judgment then file a post-trial motion, you may have to file an amended or new notice of appeal regarding the motion. Mr. Shea said that under the new formulation of the rule, a notice of appeal filed after the judgment was entered but before attorney fees are determined is held in abeyance until the judge rules on the motion. Judge Blanch said the language in the note makes sense to keep.

Mr. Shea reported that the appellate rules committee agreed with including Rule 60(b) on the list of circumstances in which the notice of appeal deadline would run from the disposition of the motion. Mr. Shea drafted a note to that effect, which highlights the difference a day makes. A Rule 60(b) motion may be filed up until 90 days after the judgment is entered and it will still be timely, but it won't have the same effect as filing it within 28 days.

Discussion:

- Mr. Hunnicutt asked whether attorney fee motions should also be connected to the 28-day deadline. Mr. Shea responded that motions for fees must be filed within 14 days of the judgment's entry under the new Rule 73 to be sent out for comment.

- Mr. Shea also asked whether he should attempt to summarize the outcome of the subcommittee's review before these rules are sent out for comment to give a level of comfort with them. Although the Supreme Court recognized that adoption of the federal rule was a possible outcome, he is unsure whether the justices anticipated the additional changes the committee is recommending. The appellate rules committee would like to see what the public has to say, as would our subcommittee. Given that, Judge Toomey moved to adopt Mr. Shea's suggestions and send the rules out for comment. Judge Blanch seconded. Mr. Hunnicutt commented that Rule 4(b)(1)(f) sounds loose, and that perhaps "claim" should be eliminated. Mr. Shea suggested that Rule 73 be referenced in a comment, but that because "claim" is used in Rule 73, it may be problematic to remove "claim" from Rule 4. With that reference added, Judge Toomey again moved to send the rules out for comment. All approved.

V. Rule 13 and 15.

Mr. Shea discussed the further draft of Rule 15. Kent Holmberg had reported that there is no state rule counterpart for the U.S. attorney general provision in the federal rule, so Mr. Shea removed that provision. Mr. Shea also reported that Rule 13 has some further amendments to discuss, including a question regarding Rule 13(d).

Discussion:

- Mr. Slaugh questioned whether "jurisdiction" is the correct word in Rule 13 on page 54, line 43. Mr. Shea said it is a copy-and-paste from the federal rule. Mr. Slaugh said to leave it. Judge Blanch said at worst, it is unnecessary.

- Although the new Rule 15 follows the federal rule, Mr. Shea questioned whether paragraph (d) is necessary—wouldn't a supplemental pleading asserting a counterclaim be an amendment under Rule 15 just like an omitted counterclaim under (eliminated) paragraph (e)? Mr. Slaugh identified one distinction: under Rule 15, a party is amending a complaint that already exists, whereas under paragraph (e), a party is asserting a counterclaim that did not previously exist.

- Mr. Hunnicutt asked whether the idea is to loosen the standard to amend pleadings. Mr. Shea said that a substantive change to Rule 15 was suggested by Justice Voros regarding relation-back. Judge Voros felt the federal rule was a better expression of policy and an express policy, whereas under the state rule, parties have to rely on case law. The other Rule 15 changes are controlled by phrasing and grammar styles in the federal rule that resulted in some substantive changes. For example, now the plaintiff has discretion to amend under some circumstances that under the former rule required stipulation. Since we're amending Rule 15 to address the relation-back issue, we are amending Rule 13 to delete paragraph (e),

- Mr. Stancil said, with respect to the use of "jurisdiction" in Rule 13, he thinks it is there because the federal court is a court of limited jurisdiction. It likely doesn't matter, however, because the state court will virtually always have jurisdiction. Judge Blanch agreed that it probably doesn't matter, but since we are following the federal rule, it may look as though we are doing something we don't have jurisdiction to do if we remove it.

- Mr. Shea mentioned that there is no federal counterpart for the final two paragraphs of Rule 13. He made some style suggestions, but questioned whether they are necessary, as they appear to describe a situation that is outside of litigation. The committee discussed the meaning of the two paragraphs, whether they reflect a rule of procedure or are more substantive, and whether they should be removed or left alone. Ms. McIntosh suggested that Mr. Shea perform some historical research on the two paragraphs.

VI. Rule 12

Mr. Shea discussed Rule 12 and the committee's prior approval of proposing a process to accept service of a summons and complaint and replacing the "waiver" of service process in the rule. This

approach necessitated an amendment to Rule 12 to identify the time in which to answer. Mr. Shea also said that John Bogart has requested that we eliminate cost bonds for out-of-state plaintiffs.

Discussion:

- Mr. Slaugh commented that practitioners have been accepting service forever and have never needed lines 10-12. He asked what is different about accepting service that mandates a new rule that says if you accept service you have to answer within 21 days. Mr. Shea responded that this might be better under Rule 4, but the concept was to replace service by mail and waiver of service with the concept of acceptance of service. The defendant responds with some kind of written acknowledgement that ends up in court file so the court has reasonable assurance that the defendant has been given the complaint and summons and understands them sufficiently to return the form. There is a practice among lawyers of accepting service on behalf of clients, and Mr. Shea said he doesn't know if this would disrupt that. The defendant can also control the time in which the 21 days begins by not signing immediately. Mr. Slaugh suggested that it might be easier to say in Rule 4 that if you accept service, then service is effective on the date you accept. Mr. Shea said the problem with that is there is no record of when service was accepted. This allows for a receipt by requiring the defendant to send the acceptance back in a return envelope, which will have a date.

- Mr. Shea pointed out that Rule 12(h)(1)(A) seems to be encompassed entirely by (h)(1)(B). Although this is how the federal rules express it, he questioned whether they are duplicative. Prof. Stancil said he doesn't think they are duplicative. Without (h)(1)(A), (h)(1)(B) could be read very restrictively such that if you tried to file a second motion, it would be a motion under this rule. Although horribly worded, he thinks it is necessary. He suggested changing (h)(1)(B) to say "Rule 12" instead of "this rule." Judges Baxter and Anderson agreed with that proposed change. Mr. Shea explained, however, that throughout the rules he has used "this rule" to refer to the entire rule. Judge Toomey noted that changing it would result in a consistency problem.

- Mr. Shea said that the bond requirement in Rule 12 for out-of-state plaintiffs was in the last two paragraphs on page 63. There is no counterpart in the federal rule, so consistent with Mr. Bogart's suggestion, he struck the requirement. Judges Toomey and Blanch agree with the removal. Mr. Slaugh said there are cases that give greater rights to in-state litigants, but that removal of the bond requirement for out-of-state plaintiffs is not offensive to the overall scheme.

VII. Adjournment.

The meeting adjourned at 5:40 pm. The next meeting will be held on December 16, 2015 at 4:00 pm at the Administrative Office of the Courts.