UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Meeting Minutes – June 22, 2016

Present:	Amber Mettler, Terri McIntosh, Magistrate Judge Furse, Judge Kate Toomey, Lori Woffinden, Rod Andreason, Kent Holmberg, Judge James Blanch, James Hunnicutt, Jonathan Hafen, Trystan Smith, Steve Marsden, Judge Lyle Anderson, Barbara Townsend
Telephone:	Lincoln Davies
Staff:	Nancy Sylvester, Heather Sneddon, Tim Shea
Guests:	Utah Supreme Court Justices and Court Staff

I. Welcome and Recognition/Appreciation of Outgoing Members – Jonathan Hafen

Jonathan Hafen welcomed justices from the Utah Supreme Court and court staff to the meeting, and invited their comments regarding Tim Shea's retirement. Chief Justice Durrant commented that Mr. Shea's fingerprints are all over our court system, and that few have done more to improve the administration of justice in our courts than Mr. Shea. Mr. Shea expressed his gratitude. Mr. Hafen also noted that Steve Marsden, Judge Anderson, and Scott Bell are departing (or have departed) as members of the committee this year, and expressed the committee's appreciation for their service.

II. Approval of minutes. [Tab 1] – Jonathan Hafen.

Mr. Hafen invited a motion to approve the minutes. Rod Andreason and Jim Hunnicutt suggested some edits. Mr. Andreason moved to approve the minutes with the suggested corrections. Mr. Hunnicutt seconded. All voted in favor.

III. Rule 4(d)(1)(A), Personal Service. Comments to Proposed Amendments. [Tab 2] – Nancy Sylvester

Nancy Sylvester discussed the comments received on the proposed amendments to Rule 4(d)(1)(A) on personal service.

Discussion:

- An issue arose as to whether the proposed amendments contemplated that a "wet signature" complaint had to be served because references to a "copy" had been removed from the rule. Ms. Sylvester said that was not the intent. Mr. Andreason suggested that the reference to a "copy" be put back in the rule. The committee discussed where in the rule a "copy" should be referenced. Ms. Sylvester suggested that she put "copy" back in wherever it appeared previously, unless in context, the rule is obviously referring to a copy. Barbara Townsend so moved. Kent Holmberg seconded. All voted in favor. Mr. Hafen mentioned that lines 191-193 may be eliminated because "copy" is going back in the rule.

- The committee discussed several commenters' concerns regarding the elimination of "any time prior to trial" from the rule regarding service on defendants. Mr. Holmberg commented that Utah is an outlier in permitting service up until the time of trial. Several members commented that a plaintiff may always file a motion seeking additional time to serve one or more defendants if the plaintiff has been diligent in attempting service. The cost of that motion is trivial compared to starting discovery over again because one or more defendants was/were served after the close of discovery. Steve Marsden suggested that the committee consider reaching out to the plaintiffs' bar on the issue. The comments do not provide much insight on the reasons for the pushback. Judge Toomey commented that while we like to make a point of hearing from people, we've already sent the rule out for comment. Mr. Hafen noted that a further comment period would delay any rule changes for six months, and we are already more generous than the federal system regarding service. Judge Blanch said that we are coming into conformity with other jurisdictions.

- Other commenters raised issues regarding the elimination of the waiver of service procedure. Judge Blanch commented that he believes people are confused about the removal of that procedure; the rules still allow acceptance of service of process under subsection (d)(3). Terri McIntosh mentioned that the elimination of waiver of service removes the ability to recover the cost of service. The judges reported that they rarely, if ever, saw motions to recover those costs. Ms. Townsend reported that the OPC used to seek those costs, but that she doesn't mind getting rid of the waiver of service provision. Judge Blanch and Magistrate Judge Furse said that this issue seems to reflect an education gap regarding the rule. Judge Blanch suggested an alteration to the committee note: "Elimination of the procedure for seeking waiver of service under subsection (f) does not eliminate the parties' ability to agree to acceptance of service under subsection (d)(3)."

- Some commenters suggested that subsection (d)(1) prohibit anyone interested in the action from serving process, not just parties to the action. Sylvan Wornick further proposed that service be accomplished by a U.S. citizen. Ms. Sylvester explained that the committee had removed the previous language in the rule regarding service by a sheriff or constable, and suggested that perhaps that language be added back in. Mr. Andreason said he is opposed to adding the language back in because it is redundant. The committee agreed. Ms. Sylvester will add the proposal that service be accomplished by a U.S. citizen to the cue.

- Judge Toomey moved that Rule 4 be sent to the Supreme Court as further amended during the meeting. Mr. Andreason seconded. All voted in favor.

IV. Rule 58C, Motion to Renew Judgment. [Tab 3] – Judge Joseph Bean, Nancy Sylvester

Ms. Sylvester described an issue raised by Judge Bean about Rule 58C: if a judgment is renewed, is accrued interest added to the balance of the old judgment, which would then cause interest to be compounded going forward, or is it just the balance of the old judgment that is renewed, with simple interest continuing to accrue? He prepared a memo on it. She discussed the issue with Mr. Shea, and he indicated that interest is a creature of statute.

Discussion:

- Kent Holmberg asked whether this is a question the committee has already considered. Ms. Sylvester responded that the question previously before the committee was whether the

old post-judgment interest rate or the new interest rate applied to a renewed judgment. This question is different.

- Judge Anderson commented that perhaps the committee should not be deciding this question. If the statute is unclear regarding how interest should be calculated, it likely a question for the Legislature. It isn't procedural. Mr. Hafen asked whether other committee members agreed. The committee agreed with Judge Anderson; the rule will be left as-is.

V. Rule 35, Physical and Mental Examination of Persons. [Tab 4] – Trystan Smith, Judge Blanch, Barbara Townsend

Trystan Smith explained that he and the subcommittee on Rule 35 have come up with proposed language to address the two main questions regarding the rule: whether and when. The answer to "whether" a Rule 35 report must be disclosed is yes, but it will look different than a Rule 26(a)(4) report. The answer to "when" the Rule 35 report must be disclosed is 28 days after the examination. Judge Blanch prepared language for the advisory committee note explaining the differences between a Rule 35 and Rule 26(a)(4) report. In all cases, if a Rule 35 exam has been conducted, a Rule 35 report will be issued. If the examining party elects a report, a subsequent Rule 26(a)(4) report will be prepared. Nevertheless, a party is not precluded from choosing to issue a combined report that complies both with Rule 35 and Rule 26(a)(4). Mr. Smith also described the competing interests of plaintiffs' lawyers and defense lawyers that the subcommittee tried to balance in coming up with the changes to this rule. Mr. Hafen complimented the subcommittee on its work.

Discussion:

- Mr. Hafen asked committee members whether they felt that the rule changes were fair to both sides. They reported that they did.

- Mr. Andreason raised a potential timing ambiguity in line 16: when the rule explains that a party must disclose their examiner as an expert under Rule 26(a)(4), are we talking about the entire rule, including the timing? If so, he suggests that it be changed to "in the time and manner" required under Rule 26(a)(4). Barbara Townsend and Judge Blanch indicated their approval of the change.

- Jim Hunnicutt raised a question concerning the new language in the advisory committee note and whether we want to include the term "medical." Sometimes these examinations are not "medical" per se; he treats vocational assessments as Rule 35 examinations. Judge Blanch commented that we are trying to capture the concept that what you are entitled to is a medical record—something that a treating physician would create. While he understands the impetus for wanting to remove "medical," he likes having that as an anchor because people will better understand what is required. A vocational expert is different, but he does not believe it will create confusion. He is concerned that if "medical" is removed, we will lose the reference to the type of record that is very familiar to everyone, particularly when the overwhelming majority of reports under Rule 35 are in fact medical. Mr. Marsden suggested that "medical" be removed from lines 41 and 44. Judge Blanch agreed with those removals, as did Mr. Smith.

- Judge Toomey moved that we send the rule out for comment with the amendments discussed. Amber Mettler seconded. All voted in favor.

VI. Fed. R. Civ. P. 34(b)(2)(A)-(C), Requests for Production. [Tab 5] – Nancy Sylvester

Ms. Sylvester reminded the committee that we have been reviewing Rule 34 for potential changes in response to the changes recently made to the federal rule. The committee was concerned about adopting the federal changes wholesale. Therefore, Ms. Sylvester added the specificity requirement in line 23, and with respect to lines 24-25, she adopted FRCP 34(b)(2)(C) requiring the responding party to state whether responsive materials are being withheld. She also added some clarifying language in lines 25-26 from the federal advisory committee notes.

Discussion:

- Mr. Andreason commented that this is a good draft—better than the federal rule. Mr. Smith agreed that this draft provides more clarity on the "specificity" required.

- Mr. Andreason suggested a minor change: on lines 24-26, we use the term "materials," whereas subsection (b)(1) refers to "items." He'd prefer to use "items" in place of "materials."

- Mr. Andreason also suggested that at the end of lines 24-25, we should require that the responding party describe the category of items being withheld. The alternative to describe the limits on the search conducted may be kept. Mr. Marsden said that it doesn't provide a lot of teeth, but it does provide some. Thinking of the federal rule that permits a description of categories of documents, you're going to get descriptions such as "financial documents," "insurance policies," and "correspondence." Mr. Andreason said he would be fine with that; at least he'd be getting something. Ms. Mettler questioned whether the change would be circular. She would be inclined to simply parrot back the request. It seems onerous to have to catalogue what you are withholding. Messrs. Hafen and Hunnicutt suggested that the rule say "describe the items being withheld." Judge Blanch asked whether that would invite litigation over whether a privilege log, or something similar, is required. He doesn't want to invite that.

- Mr. Smith suggested that the language relate back to subsection (b)(1): if you object, it has to be based on the requested item or category. Thus, after "an objection must state," we would add "by individual item or category" whether any responsive items/documents are being withheld. Mr. Andreason commented that he thinks this might be the best resolution.

- Mr. Hunnicutt questioned whether "relevant" is superfluous in line 26. Mr. Marsden responded that "relevant" should stay—people frequently ask for information that is irrelevant. That is the basis for the objection. He proposed instead that the rule say that an "objection that states the limits that have controlled the search qualifies as a statement that the items have been withheld." He would leave out "responsive" and "relevant."

- Mr. Andreason moved to send the rule out for comment as amended during the meeting. Mr. Hunnicutt seconded. All voted in favor.

The meeting adjourned at 5:40 p.m.