Agenda
Advisory Committee on Rules of Civil Procedure

April 22, 2009
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Approval of minutes	Tab 1	Fran Wikstrom
Rule 35. Physical and mental examination of persons		Frank Carney Tom Lee
Rule 63A. Change of judge as a matter of right.	Tab 2	Judge Anthony Quinn
Consideration of comments to rule amendments.	Tab 3	Tim Shea
Simplified Civil Procedures		Fran Wikstrom

Committee Web Page: http://www.utcourts.gov/committees/civproc/

Meeting Schedule

May 27, 2009
September 23, 2009
October 28, 2009
November 18, 2009
January 27, 2010

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 25, 2009
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Lincoln Davies, Jonathan Hafen, David W. Scofield, Cullen Battle, Barbara Townsend, Leslie W. Slaugh, Lori Woffinden, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Janet H. Smith, Anthony W. Schofield, Steven Marsden, Honorable Derek Pullan

EXCUSED: Thomas R. Lee, Honorable Anthony B. Quinn

STAFF: Tim Shea, Matty Branch, Trystan B. Smith

GUESTS: Hon. Rebecca Love Kourlis, former Colorado Supreme Court Justice, Director, Institute for the Advancement of the American legal System ("IAALS")
Richard Schauffler, Director of Research, National Center for State Courts ("NCSC")
Paula Hannaford, Principal Research Consultant, National Center for State Courts

I. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom introduced and welcomed our guests, Rebecca Kourlis, Richard Schauffler, and Paula Hannaford, and invited them to share with the committee their interests in our efforts to adopt simplified rules.

Ms. Kourlis noted the Institute's broad mission is to contribute to the advancement of the American legal system, but more specifically, the Institute was available to provide hands-on assistance to states wanting to implement simplified rules. Mr. Schauffler discussed his role as director of the NCSC and the NCSC's ability to provide logistical support to states considering adopting simplified rules. Ms. Kourlis noted their respective organizations could provide tool kits for jurisdictions wanting to impose simplified rules, for example, data collection, surveys, baseline data compilation, suggested methodologies, and model rules.

Why should we care about measurements?

Mr. Wikstrom asked the committee to discuss measurements and whether it needed or wanted to assess the effects of simplified rules before implementation.

Mr. Schauffler noted that measurements were important to verify the committee's assumptions as to why it wants to adopt simplified rules. He further noted that the committee, at the outset, is in the best position to decide the factors to use in measuring performance.

Ms. Kourlis noted that it is easier to implement changes if there is a commitment to measure the results.

Mr. Slaugh questioned how much time would it take to gather baseline data before the committee could implement simplified rules.

Ms. Hannaford noted she did not believe the committee needed to delay implementation of simplified rules if it wanted to gather and analyze baseline data. Ms. Kourlis agreed.

Mr. Shaughnessy questioned how the committee would measure whether simplified rules decreased the expense of litigation.

Judge Pullan asked whether there were certain rules that could be modified or changed without engaging in measurements. He also expressed concern about delaying implementation of simplified rules while engaging in measurements.

Ms. Kourlis suggested the committee focus on (1) what it wants to achieve, and (2) what the rules should look like, and the Institute and Center would quantify and analyze the measurements.

Ms. Kourlis noted she was not aware of any current empirical data regarding the effect of simplified rules on the committee's previously stated goals.

After discussion, the committee agreed to focus on formulating a set of simplified rules, and allowing the Institute and the Center to focus on measurements.

What would be the earmarks of success? What would be expected impacts on:

Mr. Wikstrom asked the committee members to share what they hoped to be the expected outcomes from the adoption of simplified rules.

- **Costs to litigants**

The committee agreed the expectation is that costs would decrease.

- **Costs to society**

- **Number of trials**

The committee agreed the number of trials presumably would increase.

- **Length of trial**

Judge Nuffer noted that with less discovery, trials may be longer. Mr. Shaughnessy and several other committee members debated whether the length of trials would be longer with simplified rules.

- **Effect on discovery motions**

The committee debated whether simplified rules would decrease the amount of motions. Mr. Marsden noted that simplifying the manner in which discovery motions are decided may lead to more discovery motions, but a faster, more satisfying result.

- **Effect on motions**

Mr. Carney noted that if we have a fact pleading rule there would be an increase in the amount of motions, for example, motions for a more definite statement, motions to dismiss, etc.

- **Effect on time to disposition**

The committee agreed the time from commencement of the action to final disposition should be significantly faster.

- **Effect on expert depositions**

The committee agreed the amount of expert discovery should dramatically decrease, along with the number of experts.

- **Effect on e-discovery**

Mr. Davies suggested that with simplified discovery the amount and cost of e-discovery would decrease. The committee debated whether e-discovery should be measured separately from discovery in general.

- **Effect on litigant satisfaction and perception of fairness**

- **Effect on potential litigants - whether people feel they can participate in the legal system**

- **Proportionality**

The committee agreed that discovery costs in proportion to litigation costs should decrease.

- **Effect on court satisfaction**

The committee's current and past trial court judges weighed the considerations of less discovery disputes, more trials, and the interplay of summary judgment motions. Judge Pullan questioned whether judicial satisfaction should be a material factor in the committee's considerations.

- **Differentiate between success versus an unintended/intended consequence**

- **Impact on pro se filings**

- **Number of filings**

The committee agreed ideally courts would see more filings and more filings of matters with smaller amounts-in-controversy.

After extensive discussion, our guests indicated that the expectations the committee discussed were specific enough for them to engage in measurement process.

Which is the best way to proceed with simplified rules?

- **Pilot program**
  - **By type of case?**
  - **By amount of issue?**
  - **By geographical location?**

The committee debated the substance of a pilot program. The committee discussed using a class of cases, or a dollar limit. The committee further discussed potential equal protection challenges to a pilot program by the type of case.

Ms. Kourlis noted in certain jurisdictions such as Colorado the simplified rules have been ineffective because practitioners opt-out or plead a dollar amount above the minimum limit.

Mr. Slaugh noted he would not be in favor of including a dollar limit because the complexity of the case is not tied to the amount-in-controversy. He suggested that a party wanting to opt-out would need to seek judicial relief to do so — an escape clause.

Mr. Davies and Mr. Shaughnessy noted an opt-out process would be impractical and undermine the purpose behind adopting simplified rules.

The committee discussed the considerations of when a party should be allowed to opt-out, and requiring client approval.

Mr. Davies suggested the idea of tiers (tied to the amount-in-controversy). He also addressed his worries about lawyers manipulating the system, and the unintended consequence of increased litigation concerning the actual amount-in-controversy to meet the simplified rules threshold.

Mr. Carney observed that expert discovery typically encompassed the majority of discovery costs. He questioned how practitioners in the state of Oregon treated the lack of expert discovery.

Mr. Wikstrom asked the committee to provide its thoughts about a pilot program versus adopting state-wide revisions.

Mr. Schauffler suggested that pilot programs can be ineffective based on where the pilot program is conducted, and the metrics used for the program.

Ms. Smith noted her concerns about how the committee measures greater access to the judicial system, when we cannot capture statistics about who failed to bring a claim and why.

Mr. Wikstrom asked the committee to consider if there was an opt-out provision should there also be conditions requiring the trial court to evaluate proportionality and/or the bases for opting out.

Several of the committee members noted that before any change could take place, it would require deliberation and extensive education for members of the Bar.

Mr. Carney questioned whether the Bar would believe there was a problem with access to justice.

Mr. Wikstrom asked the committee to decide whether it should proceeded with (1) a pilot program containing an opt-out provision, or (2) state-wide revision with an opt-out provision.

Mr. Wikstrom asked the committee members for an initial vote — pilot program versus state-wide implementation. The committee expressed slightly more support for state-wide implementation.

Mr. Wikstrom concluded the committee's discussions and asked that the committee, as a starting place, discuss the Institute's draft rules at the next meeting.

II. ADJOURNMENT.

The meeting adjourned at 7:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, April 22, 2009, at the Administrative Office of the Courts.

Tab 2

Rule 63A. Change of judge as a matter of right.

(a) Notice of change. Except in actions with only one party and in small claims proceedings, ~~in any civil action commenced after April 15, 1992 in any district court,~~ all parties joined in the action may, by unanimous agreement and without cause, change the judge assigned to the action by filing a notice of change of judge. The parties shall send a copy of the notice to the assigned judge and the presiding judge. The notice shall be signed by all parties and shall state: (1) the name of the assigned judge; (2) the date on which the action was commenced; (3) that all parties joined in the action have agreed to the change; (4) that no other persons are expected to be named as parties; and (5) that a good faith effort has been made to serve all parties named in the pleadings. The notice shall not specify any reason for the change of judge. Under no circumstances shall more than one change of judge be allowed under this rule in an action.

(b) Time. Unless extended by the court upon a showing of good cause, the notice must be filed within 90 days after commencement of the action, before any issue is decided by the judge or ~~prior to the~~ before notice of trial setting, whichever occurs first. Failure to file a timely notice precludes any change of judge under this rule.

(c) Assignment of action. Upon the filing of a notice of change, the assigned judge shall take no further action in the case. The presiding judge shall promptly determine whether the notice is proper and, if so, shall reassign the action. If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the Chief Justice, who shall determine whether the notice is proper and, if so, shall reassign the action.

(d) Nondisclosure to court. No party shall communicate to the court, or cause another to communicate to the court, the fact of any party's seeking consent to a notice of change.

(e) Rule 63 unaffected. This rule does not affect any rights under Rule 63.

Tab 3

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: April 16, 2009
Re: Comments to published rules

The comment period for the following rules has closed, and they are ready for your final recommendations.

Summary of rule amendments

URCP 052. Findings by the court; correction of the record. Amend. Establishes a procedure for correcting the record of a hearing.

URCP 076. Notice of contact information change. New. Requires attorneys and parties to inform the court of changes to contact information.

URCP 007. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order. Amend. Move process for objecting to a commissioner's recommendation from Rule 7 to Rule 101.

URCP 101. Motion practice before court commissioners. Amend. Move process for objecting to a commissioner's recommendation from Rule 7 to Rule 101.

Comments

There were many comments to the plan to record trial court hearings only by audio/video, but none were relevant to Rule 52. We did not receive any comments to Rule 76, but apparently Judge Page and I had drafted a different version of this same proposal in 2006. I cannot remember why it was not pursued at the time, but I have attached it.

We received the following comments to Rules 7 and 101.

Every time any amendment to Rule 7 or 101 is proposed I ask the same question, but have yet to receive a response. But the questions are worth asking:

1) Why do we have a different timetable for motions before court commissioners than for motions before judges? Why not have the same timetable apply for all motions at the district court level? It will result in fewer rules to remember and confuse and forget.

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2) Why do we require any and all motions before court commissioners to be subject to hearings? Why can't a movant submit a motion and have it decided on the pleadings where the movant does not want a hearing and the opposing party does not want a hearing either? Surely the commissioners would have no objection to fewer hearings. Surely attorneys who don't want a hearing would appreciate the option. So why did this idea that motions before commissioner MUST be subject to hearings? I've really tried to think of a justification for this practice, but I cannot see any rational necessity for it.

Posted by Eric K. Johnson January 13, 2009 08:32 AM

Since the rule is being amended, perhaps an addition requiring that the objection state with specificity the objection and why the person objecting is entitled to a different result. This, I think, would be of benefit to the Judge reviewing the case and to the opposing party who is responding to the objection.

Most objections will state the objection but sometimes it is not included, the attorney will simply state that his/her client is objecting to the ruling. There is no statement regarding what part of the recommendation is being objected to and why.

Posted by David Dillon January 5, 2009 02:27 PM

Encl. Draft rules

Rule 52. Findings by the court; correction of the record.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(c)(1) by default or by failing to appear at the trial;

(c)(2) by consent in writing, filed in the cause;

(c)(3) by oral consent in open court, entered in the minutes.

(d) Correction of the record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within 10 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement shall be resolved by the court and the record made to accurately reflect the proceeding.

Rule 76. Notice of contact information change.

An attorney and unrepresented party must promptly notify the court in writing of any change in that person's address, e-mail address, phone number or fax number.

From Judge Page from 2006

Rule 78. Party to inform court of address.

(a) Each party to a case or the party's lawyer shall notify the court clerk of the party's address, e-mail address and phone number and in any changes to that information.

(b) If repeated attempts to contact the party have failed and the clerk has reason to believe that the court does not have a party's correct address, e-mail address or phone number, the court may issue an order to show cause why the case should not be dismissed.

(c) At least ten days before the hearing on the order to show cause, the clerk shall:

(c)(1) mail the order to show cause and notice of the hearing to the party at the party's last known address:

(c)(2) mail the order to show cause and notice of the hearing to the party's lawyer, if any; and

(c)(3) post the notice in the courthouse.

(d) If the party does not notify the court clerk of the party's address, e-mail address and phone number at or before the hearing, the court may take the action it determines is appropriate, including to dismiss the case. The order of dismissal shall recite the attempts to contact the party.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b)(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b)(2) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue

exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be

enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

~~(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.~~

Advisory Committee Notes

Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order shall be by motion which, unless made during a hearing, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. A party may file and serve with the motion a memorandum supporting the motion. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response; reply. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) As used in this rule “attachments” includes all records, forms, information and affidavits necessary to support the party’s position. Attachments for motions and responses regarding alimony shall include income verification and a financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, a financial declaration and a child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party’s position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If attachments necessary to support the responding party’s position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the time required in subsections (b) or (c), the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing. A separate notice of hearing on counter motions is not required.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show cause to believe a party has violated a court order.

(j) Motions to judge. The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be to the judge.

(k) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion under Rule 7 within ten days after the recommendation is made in open court or,

if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.