MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

NOVEMBER 20, 2013

PRESENT: Jonathan Hafen, Chair, W. Cullen Battle, Hon. John L. Baxter, Scott S. Bell, Hon. James T. Blanch, Frank Carney, Steven Marsden, Terrie T. McIntosh, Hon. Todd M. Shaughnessy, Leslie W. Slaugh, Trystan B. Smith, Hon. Kate Toomey, Barbara L. Townsend, Lori Woffinden

TELEPHONE: Hon. Lyle R. Anderson, David W. Scofield

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Sammi V. Anderson, Prof. Lincoln Davies, Hon. Evelyn J. Furse, David H. Moore, Hon. Derek Pullan

GUESTS: Debra Moore

I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the October 23, 2013 minutes. It was moved and seconded to approve the minutes as drafted in the meeting materials. The motion carried unanimously on voice vote.

II. RULE 5

A. Service by Fax

Discussion. The committee next considered the proposed revision to Rule 5. Mr. Shea introduced subparagraph (b)(1)(A) of the proposed revision, which would remove the requirement to obtain a party's consent before serving that party via email or fax.

Several members opined that the option to serve by fax should be eliminated. Mr. Slaugh noted that some practitioners preferred fax transmission for sending confidential documents, as it is a more secure method of transmission than email. Also, it is easier for some *pro se* parties to send a fax than to figure out

how to send a document by email. He added that if the committee were to keep fax transmission as a method of service, the consent requirement should be retained, as he did not want to receive service by fax and doubted that many other practitioners did either. Judge Shaughnessy observed that Rule 5 does not prevent a party from waiving its requirements and consenting to receive service in whatever manner it chooses. Having a special provision of the rule about service by fax would be unnecessary.

Committee Action. Mr. Hafen asked the committee whether anyone had an objection to eliminating the service by fax provision. No member raised an objection, and the motion to delete (b)(1)(A)(iii) was informally approved.

B. Service by email

Discussion. The committee turned its attention to service by email. Ms. Moore stated her concern about allowing service via email on *pro se* litigants without their prior consent. She worried that unsophisticated parties may not realize that important court documents would be delivered to the email address they wrote down on the cover sheet; causing problems with actual notice. She added that because of mandatory e-filing, there would be little need to serve other attorneys by email. Mr. Slaugh responded that as disclosures and discovery documents cannot be e-filed, the current rule still requires service of those documents by mail unless the other side consents to be served by email. The purpose of this revision would be to allow service by email when the document could not be served by e-filing. Mr. Whittaker added that proposed orders also needed to be served at least seven days before they are filed.

Mr. Whittaker proposed amending the revision to allow service by email if the other party consents or if the other party has an e-filing account and the document must not be filed concurrently with service. Mr. Slaugh argued that the restriction to documents that were not to be e-filed was unnecessary and suggested that the email provision should be amended to read: "by sending it by email if that person has agreed to accept service by email or has an electronic filing account."

Mr. Battle raised the concern of an email containing a document to be served getting caught in the recipient's spam filter. In such a circumstance, the sender would not get a notification that the email was not received. He also raised the concern of an email serving a response to discovery being bounced back. The current rule states that "service by electronic means is not effective" in such a circumstance, and by the time the sending party received notice, the

responses would already be untimely. While this delay would probably be deemed "harmless" under Rule 37(h), that provision does not apply to requests for admission, which would automatically be deemed admitted under Rule 36(b)(1). Mr. Whittaker suggested that the rule could be amended to allow a party to make alternate service within a certain amount of time after it receives notice that the transmission failed.

Mr. Slaugh pointed out that under the current rule, papers served by mail are effectively served even if the serving party learns that they did not make it to the party to be served, but papers served by email or other electronic means are not. He suggested eliminating the difference between the effectiveness of service by mail and by electronic means by deleting the last sentence of (b)(1)(B). He added that it is the responsibility of a party under the jurisdiction of the court to keep the court and parties informed of its address. If the party fails to do this, there must be some way to serve the paper. Judge Blanch suggested that deleting the last sentence of (b)(1)(B) would be acceptable so long as service by email was restricted to those who consented to it or who had an e-filing account. That restriction should limit the problem of invalid email addresses, as presumably someone who agreed to accept service by email or who has an e-filing account would understand the importance of keeping his or her email address up to date. Mr. Slaugh added that judges have discretion to enlarge the time for response or to declare a paper timely filed. Removing this provision would not deny the receiving party a remedy if it did not receive actual notice; it would just allow the judge to determine the remedy rather than automatically invalidating service.

Committee Action. Mr. Hafen asked the committee whether anyone had an objection to making the changes suggested by Mr. Slaugh. No member raised an objection, and the committee informally approved amending (b)(1)(A)(ii) by deleting the words "to the person's last known email address" and adding "or has an electronic filing account" to the end of that sentence, and deleting the last sentence of (b)(1)(B).

C. Filing

Discussion. Mr. Shea next introduced subdivision (d) of the proposed revision. Mr. Shea noted that the committee had previously expressed a desire to have the rule focus on filing papers rather than service. Therefore, this proposal would amend the language of (d) from "papers must be filed before or within a reasonable time after service" to "papers must be served before filing." The

proposal would also add a sentence stating that submitting a paper for e-filing will serve the paper on someone with an e-filing account.

Mr. Slaugh observed that requiring papers to be served before filing may be problematic. For example, if he had to serve a *pro se* party, his usual practice would be to e-file the document and drop it in the office mail; an office employee would take the mail to the post office or a mailbox later that day. While it is unlikely that it would be an issue in a case, technically he would be violating the rule, as the paper would be filed when he e-filed it, but would not be served until the mail was dropped off at the post office or into a mailbox. Judge Anderson suggested that the problem could be resolved by adding the language "or on the same day as" between "before" and "filing." Mr. Slaugh and other members agreed that this would solve the problem.

Several members questioned whether the sentence stating that submitting a paper for e-filing will serve the paper on someone with an e-filing account was necessary. Mr. Shea granted that the sentence was not a direction but a statement of fact. Mr. Battle was concerned that someone reading the sentence might wonder whether the sentence imposed a requirement. If the only point of the sentence is to state that e-filing of a paper constitutes service of the paper, then it is redundant with (b)(1)(A)(i). It was generally agreed that the sentence should be removed.

Committee Action. Mr. Hafen asked the committee whether anyone had an objection to approving the proposal with the changes mentioned. No member raised an objection, and the committee informally approved amending (d) by replacing "shall be filed with the court either before or within a reasonable time after service" with "must be served before or on the same day as filing."

D. Filing Date

Discussion. Mr. Shea next noted an issue that was not included in the proposed revision but had been previously raised by Mr. Scofield: while (e) provides that a paper filed with the court must have the filing date noted on the paper, there is no filing date noted on e-filed papers. Rather, the filing date is noted as a piece of metadata imbedded in the PDF file.

Mr. Slaugh noted that the federal e-filing system puts a header with a filing date and document number on each paper and felt it would be better if the state did the same thing. Ms. Moore responded that the technology committee considered that option, but ended up adopting a hard and fast rule that they

would make no changes to the appearance of the document from when it was filed.

Some members asked whether the requirement to note the filing date on the paper was necessary. Mr. Slaugh noted that the provision should still be there to direct the handling of paper filings. He added that the provision would be especially important in the circumstances where a judge agreed to accept a paper for filing. Mr. Whittaker pointed out that the language of the federal rule explicitly provided that a judge who accepted a paper for filing was to note the filing date on the paper and promptly deliver it to the clerk.

Mr. Shea noted that as Rule 10(i)(2) provides that a paper electronically signed and filed is the original, the metadata appended to the electronic file is sufficient to comply with the existing rule, and so no changes need to be made. Committee members suggested that if the language were kept, that it should be noted in an advisory committee note that appending of metadata to the electronic file by the electronic filing system constitutes "noting on the paper" for purposes of Rule 5(e).

Mr. Hafen expressed his opinion that the potential for confusion with respect to whether electronic papers were in compliance with Rule 5(e) outweighed any benefits of leaving the language in, and advocated deleting the language.

Committee Action. Upon Mr. Hafen's motion, the committee agreed to delete the sentence "The filing date shall be noted on the paper" from (e).

E. Style Amendments

Mr. Shea next asked whether the committee would like to consider style amendments to the rule. The committee agreed to table the proposed revision until the next meeting to allow a draft to be prepared for review that incorporates the changes listed above and that restyles the language of the rule as appropriate.

III. RULE 10

A. Margins

Discussion. The committee next considered the proposed revision to Rule 10. Debra Moore, the District Court Administrator for the Administrative Office of Courts, introduced subdivision (d) of the proposed revision, which would change the margin requirements for pleadings and papers to one inch, except

for the first page of proposed orders and other documents signed by the court, which would be two inches. Ms. Moore noted that with the introduction of e-filing, the clerks no longer needed the extra space at the top to punch holes in the paper for inclusion in the file. However, because the electronic signature of judges is placed at the top of the first page, there must be extra space at the top of the first page.

Mr. Whittaker noted that in order to create a different margin for the first page than for subsequent pages, a section break must be inserted. There is a high likelihood that the particular formatting would render improperly when converted into RTF and opened with a different word processing program than the program that created the file. Mr. Slaugh suggested that, as the proposed orders were being submitted in RTF format, perhaps the clerks could edit the document to put in the needed space. Ms. Moore responded that editing is often too time consuming and opening the file for editing often "breaks" the existing formatting. Mr. Battle suggested that rather than setting a special margin for the first page, the rule could require a two-inch top margin on all pages of a proposed order. That way, there would be no problem with the margin formatting rendering improperly.

Judge Blanch noted that the electronic signature line was rather small and asked how much space was needed on the top margin. Judge Toomey suggested that perhaps a 1.5-inch top margin was sufficient. Mr. Whittaker pointed out that a 1.5-inch top margin was the current standard in the federal district court for all documents. Mr. Hafen said that 1.5 inches should be enough room for the electronic signature line, and would have the benefit of conforming to the federal rule. Ms. Moore said that a top margin of 1.5 inches would be fine as long as it is big enough to accommodate the signature line.

Committee Action. It was moved and seconded that, subject to Ms. Moore verifying that a 1.5-inch top margin would be sufficient space for the signature line, Rule 10(d) be amended to require all pleadings and papers to have a top margin of not less than 1.5 inches and a bottom margin of not less than one inch. The motion carried on voice vote; while a dissenting vote was noted, no division was requested.

B. Signature Block

Discussion. Ms. Moore next introduced subdivision (e) of the proposed revision, which would require e-filed proposed orders to include the words "signa-

ture at top of first page" in place of the signature block at the end of the order and would forbid graphic signatures on e-filed pleadings and papers.

Judge Blanch noted that he regularly edits proposed orders to delete signature blocks as well as certificates of service to eliminate confusion between serving the proposed order and the order. He also noted that in about 25% of the cases, editing the proposed order would cause the formatting to render improperly. He asked if there was a way either to get rid of the certificate of service so that he could reduce the number of orders he has to edit, or to advise practitioners so that the proposed orders they submit did not have formatting problems. Ms. Moore responded that the e-filing program was set up to detect certain codes within an RTF document that are most likely to cause the formatting to render improperly and to automatically reject documents that contain those codes. However, the system does not detect all formatting problems.

Judge Shaughnessy questioned to what extent formatting issues should be dealt with in the rules. As the rules take time to amend, he suggested that perhaps it would be wiser to just refer in Rule 10 to a style guide that the Administrative Office of Courts could maintain and alter as needed without coming to the committee to make changes. Several members expressed their agreement with this suggestion. Mr. Shea pointed out that (d) and (e) could be eliminated if a style guide were adopted. Ms. Moore said that the Administrative Office of Courts is working on producing and compiling a style guide, but suggested that in the meantime the committee should amend the rule to address the immediate problems.

Mr. Slaugh suggested adding the words "language substantially similar to" before "signature at top of first page." He noted that other phrases such as "end of document" and "end of order—signature on top of first page" had been recommended by the Board of District Court Judges and the federal district court, and it should not matter exactly how it is worded so long as the concept is conveyed.

Mr. Hafen asked whether language similar to "end of document" should be included. Ms. Moore noted that as the approval as to form and/or the certificate of service would come after that language, "end of document" would probably not be appropriate. Judge Blanch observed that the certificate of service on proposed orders leads to confusion, as it is unclear whether it was the proposed order or order that was served. He stated that he usually deletes them before signing orders. While some members suggested submitting a certificate of

service of proposed order as a separate document, others objected, as it would clutter the docket and require the judge to find and review an extra document that, unlike the proposed order, was not submitted to him or her automatically.

Committee Action. It was moved and seconded that Rule 10(e) be amended to add the following language at the end of the subdivision: "If a proposed document ready for signature by a court official is electronically filed, the order must not include the official's signature line and must, at the end of the document, indicate that the signature appears at the top of the first page." The motion carried unanimously on voice vote.

C. Graphic Signatures

The committee turned its attention to eliminating graphic signatures. Ms. Moore explained that many practitioners are submitting scanned PDFs rather than native PDFs in order to have their signatures appear on the document. Documents submitted by e-filing should be searchable, and while it is possible to process a scanned file by OCR to make it searchable, those types of PDFs create other file-handling problems and are not preferred.

Mr. Whittaker observed that Adobe Acrobat and other PDF handling programs allow a user to insert a graphic signature onto a native PDF after it was converted. Mr. Smith noted that his firm inserts graphic signatures onto native PDFs by including them as part of his Microsoft Word document before converting the file to PDF. He felt it was more secure than using a typed signature, as the access to his signature graphic was more restricted. He also noted that some third parties question the validity of a typed signature on documents such as subpoenas, and that it is easier just to use a graphic signature for all court documents.

Mr. Whittaker was concerned that the proposed amendment addressed the symptom rather than the problem. If the problem was scanned PDFs, then the rule should require documents to be in native PDF format. Ms. Moore responded that the Electronic Filing Guide requires a signed document submitted electronically to be in a searchable PDF format, but practitioners are justifying their submission of scanned or OCR-processed documents by pointing to the current rule allowing graphic signatures. While there are ways to put a graphic signature on a native PDF, most people who are insisting on graphic signatures do not submit them that way, and changing the rule would remove an impediment to the clerks being able to insist on native PDFs.

Committee Action. It was moved and seconded that Rule 10(e) be amended as proposed in lines 45-47 of the proposed revision to Rule 10 contained in the meeting materials. The motion carried on voice vote; while a dissenting vote was noted, no division was requested.

D. Other Items and Final Approval

Mr. Hafen asked for any other proposed changes to the proposed revision before submitting it for public comment. Mr. Slaugh moved that Rule 10(f) be amended to change the sentence "the clerk of the court shall examine all pleadings and other papers filed with the court" to "the clerk of the court *may* examine *the* pleadings and other papers filed with the court." He explained that since the advent of e-filing, pleadings and papers are being filed without the direct involvement of the clerks. This amendment would conform to current practice. The motion was seconded and carried unanimously on voice vote.

As no other changes were proposed, the proposed revision of Rule 10 as contained in the meeting materials, with such amendments as noted above, was thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)-(3).

IV. RULE 43

A. Admissible Evidence

The committee next considered the proposed revision to Rule 43. The committee first turned its attention to the last sentence of (a), which currently states: "All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court." Judge Toomey moved that the sentence be removed. She noted that the sentence was tautological and serves no purpose—it just provides that admissible evidence is admissible. Mr. Hafen added that the sentence as constructed is wrong—admissible evidence that a party chooses not to present need not be admitted. The motion was seconded and carried unanimously on voice vote.

B. Originals of Affidavits

Discussion. Ms. Moore next introduced subdivision (b) of the proposed revision, which would require a party or attorney filing an affidavit with the typed signature of the affiant to keep the "wet-signature" original of the affidavit in his or her possession until the action is concluded. The revision would also re-

quire a clerk to scan and an original of an affidavit filed as a hard copy and return it to the party that filed it. Mr. Hafen noted that the language should also include a declaration.

Mr. Whittaker pointed out that current law does not require the existence of an original with a wet signature. Utah Code Ann. § 46-4-201 allows a person to sign a document electronically. Likewise, under §§ 46-1-16(7) & 46-4-205, a notary can sign and notarize an affidavit electronically. In such a circumstance, there would be no "wet signature" original for the party or attorney to keep.

Judge Blanch expressed his opinion that as affidavits and declarations are evidence, there should be a hard copy with an actual wet signature. The party filing the document should be able to indicate the affiant's signature electronically on the filed document, but should indicate on that the wet-signature original is in his or her possession. He added that there should be some sort of a process that impresses upon the affiant that he or she is under oath or making a promise to tell the truth under penalties of law. Other members noted that an electronic signature lacks distinction, and so an affidavit or declaration that is only signed electronically by a non-party poses an evidentiary problem—an affiant who made a false statement would have an easier time denying that he or she actually signed the instrument.

Mr. Slaugh remarked that current law allows him to email a draft declaration to a witness and have him or her read it and "sign" the document via confirmatory email. Judge Blanch noted that he would need to keep the email on file.

Mr. Slaugh also suggested replacing the phrase "until the proceedings are concluded," as the term "proceedings" could refer to the action or the particular motion for which the affidavit was submitted. The committee agreed that the phrase should read "until the action is concluded," as the term "action" is defined in Rule 2.

Committee Action. Mr. Hafen asked for unanimous consent to table the proposal until the next meeting so that a draft can be prepared that removes the last sentence of (a) and takes into account the provisions of Title 46 of the Utah Code. No objection was made.

V. RULES 74 & 75

Discussion. The committee next considered the proposed revisions to Rules 74 and 75, which would give a judge discretion to permit an attorney to orally

announce his or her limited appearance and/or withdrawal on the record. Ms. Moore explained that the purpose of these revisions is to accommodate the Pro Bono Project of the Utah State Bar. Currently, the judicial council has given the Pro Bono Project a temporary exemption from the electronic filing requirement to allow participating lawyers to file limited appearances and withdrawals at the time of a hearing. This revision would obviate the need for that exemption.

Mr. Slaugh suggested amending the proposed revision to Rules 74(b)(2) and 75(b) to remove the clause "in a proceeding in which all parties are present or represented." He reasoned that since this practice would only be allowed at the judge's discretion, there was no reason to limit the judge's discretion if the opposing party was not present at the hearing. The committee generally agreed with this suggestion.

Committee Action. It was moved and seconded that Rules 74 and 75 be revised as proposed in the proposed revisions contained in the meeting materials, incorporating Mr. Slaugh's suggested amendments noted above. The motion carried unanimously on voice vote.

Mr. Hafen asked for any other proposed changes to the proposed revision before submitting it for public comment. As no changes were proposed, the proposed revision of Rules 74 and 75 as contained in the meeting materials, with such amendments as noted above, was thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)-(3).

VI. RULE 6

The committee next considered the proposed revisions to Rule 6, which would establish the "days are days" approach to counting time as followed in the federal rules. The proposal would also change deadlines of 30 days or less in many of the rules to conform with a uniform length of 7, 14, 21, or 28 days. Mr. Shea noted that this proposal had been submitted for comment previously, but that the general consensus at the time was to delay adoption of the revision until e-filing was implemented.

Mr. Slaugh suggested replacing the list of holidays in lines 69-82 of the draft with a reference to the corresponding provision of the Utah Code, in case the legislature were to add, remove, or change the name of any of the listed holidays. Other members felt it was convenient to have a list in the rules, and that

the catchall provision on 81-82 would cover any eventualities. Mr. Slaugh withdrew his suggestion.

Mr. Whittaker raised a concern about the language of lines 65-66 of the draft, as it did not account for the existence of 24-hour filing boxes. Ms. Moore responded that the practice of filing by 24-hour filing box is being discontinued and the boxes are scheduled to be removed. Mr. Whittaker withdrew his concern.

Mr. Bell observed that the reference to local rules in lines 38 and 62 should probably be deleted. Judge Toomey pointed out that there are still local rules incorporated in Chapter 10 of the Code of Judicial Administration, and Rule 6 should say that it governs the computation of time in those rules. Mr. Slaugh agreed and said that the reference to local rules in line 38 should be retained. However, the reference in line 62, which would allow Rule 6 to be superceded by local rule, should be deleted. The committee generally agreed with Mr. Slaugh's suggestion.

The committee then discussed whether the "three extra days for service by mail" provision in lines 92-94 should be revised or deleted. Mr. Bell argued against deleting the provision, noting that unlike other forms of service, service by mail takes at least 24 hours from time of service to time of receipt. That means that the recipient has less time to respond to a document served by mail, justifying the extra time granted in the rule.

Mr. Shea pointed out that the federal rule retained the provision, as well as granting extra time for service by e-filing, email, and every other method of service besides hand delivery. Judge Blanch observed that the provision in the state rule was very different than the one in the federal rule, and had been for several years. While one of the committee's principles of rulemaking is to depart from the federal procedures only when there is a sound reason for doing so, he felt that the fact that a document is actually received at the time of service for every method except mailing justified the different procedure. Judge Shaughnessy agreed, and observed that the federal rule was not born out of logic but compromise—the federal rules committee was concerned that practitioners would oppose e-filing if the three days of extra time were removed. By the time Utah adopted e-filing, everyone was used to the concept of receiving filings in his or her email inbox and practitioners had much more confidence in the technology.

Mr. Hafen asked for the sense of the committee on whether (c) should be retained. The committee generally agreed that it should be retained. Mr. Marsden suggested that an advisory committee note explaining the differences between the state rule would be a good idea. Mr. Hafen asked Mr. Marsden if he would draft that note for the committee to review concurrently with its consideration of public comment on the proposed revision. Mr. Marsden agreed to do so.

Ms. McIntosh pointed out that the references to certain subdivisions of Rules 50, 52, and 59 were incorrect. Mr. Shea responded that he would double-check the references and make any necessary alterations before sending the proposed revision out for comment.

Committee Action. It was moved and seconded that Rule 6 be revised as proposed in the proposed revisions contained in the meeting materials, incorporating the suggested amendments noted above. The motion carried unanimously on voice vote. The proposed revisions to Rule 6 were thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)-(3).

VII. RULEMAKING PRINCIPLES

The committee next considered the draft document "principles of rulemaking," which was revised based on the comments and suggestions made at the committee's October meeting. Mr. Hafen explained that the point of this document was to provide guidance for him and other committee members to refer to when discussing and approving revisions to the rules to ensure that the committee's revisions are based on a consistent set of principles and that competing principles are considered and reconciled to the extent possible before final action is taken on a committee. Mr. Hafen asked for comment on the current draft.

Judge Toomey observed that the statement describing priority currently provided that "requests from the legislature and supreme court will take priority" over other proposals. She suggested adding the board of district court judges to that list.

With respect to the statement describing stability, Mr. Slaugh commented that saying that "the rules should not be amended unless there is a need" was vague. He noted that a "need" of some sort would always exist and suggested that a modifier be added to the word "need" to focus on the nature of the need

the amendment would fulfill. Mr. Hafen asked whether saying "sufficient need" would be adequate. Mr. Slaugh agreed that it would.

Mr. Marsden asked what was meant by the statement describing comprehensiveness, which reads, "The rules should include all procedures to avoid unwritten rules." Judge Blanch suggested amending the sentence to read, "Practitioners should be able to find in the rules the answers to their procedural questions." Mr. Carney added that the inverse statement would also be a valuable component of comprehensiveness—procedures that are not in the rules should not be used.

Mr. Hafen thanked the committee members for their comments so far and asked them to submit any other comments they may have to him and Mr. Shea by email so that a final draft could be prepared for discussion and approval at January's meeting.

V. RULE 37

Discussion. The committee next considered the proposed revision to Rule 37. In September's meeting, the committee directed that a draft of this rule be prepared for review that incorporated the expedited procedures for discovery motions previously published for comment as part of Rule 7, eliminated redundancies between the proposed revisions and the existing provisions of Rule 37, included references to the procedure in Rules 7, 26 and 45, and clarified that a motion for sanctions for failure to comply with a discovery order would be brought in the form prescribed by Rule 7 rather than using the expedited procedures. Having prepared that draft, Mr. Shea presented it to the committee. The committee generally approved of the draft as fit for purpose.

Mr. Shea referred the committee to the alternate language located in line 57 of the draft and noted that Mr. Whittaker had previously suggested that instead of enumerating a list of things for a nonmoving party to address in its response to a motion, the provision could just say that the response "must address the issues raised in the motion." Mr. Whittaker pointed out that this language follows the language of UCJA 4-502 and is simpler. The committee generally agreed to adopt the alternate language in the brackets of line 57 of the draft and to delete the language after the brackets in line 57 as well as the language in lines 58-60.

Mr. Hafen asked for other comments on the rule. Mr. Whittaker felt that the language of lines 17-21 of the draft (paragraph (a)(2) of the current rule) was

unclear. While it appears that the intent of this provision was to direct that motions relating to nonparties were to be heard by the court in the county where the subpoena was served while motions only dealing with parties were to be heard by the court where the action is pending, the language was unclear. Several members expressed their unfamiliarity with this provision and commented that it did not reflect current practice. Mr. Marsden and Mr. Slaugh both noted that the rule appeared to be modeled after the federal rule, but it made no sense to apply it within the state, as a district court has statewide jurisdiction. Several members suggested taking out the provision entirely or changing the provision to read, "a motion must be made to the court in which the action is pending."

Mr. Bell theorized that the provision had been inserted to accommodate nonparties by allowing them to bring a motion to quash or defend against a motion to compel close to their homes. Several members agreed that this was probably the case. Judge Blanch argued that even if that was the intent of the provision, it appeared that it was not often complied with and that it would be better to have the rule reflect actual practice. The committee agreed to remove the provision completely (as well as any corresponding language in Rule 45) and note the removal in an advisory committee note, which Mr. Whittaker agreed to draft.

Mr. Hafen asked whether the draft was logically ordered, especially with respect to subdivisions (a) and (b). Included in Mr. Hafen's question was whether a motion to compel or for a protective order (which are defined in (a)) was brought under (b), or whether the expedited discovery motion was a prerequisite to bringing a motion to compel or for a protective order. If the latter was the case, he thought that the rule should be reordered to make that clear. After some discussion, the committee concluded that an expedited discovery motion was a means for bringing a motion to compel or for a protective order, not a separate prerequisite for bringing such a motion. The committee also determined that it made sense to have the grounds for bringing an expedited discovery motion in (a) and the procedure for bringing the motion in (b).

Mr. Marsden asked whether a motion to compel brought under the expedited procedures could include a request for expenses and/or sanctions. Other members of the committee were of the opinion that it could not. Mr. Marsden observed that this was a change in existing practice and that the committee may want to indicate that in an advisory committee note. Mr. Whittaker was asked to prepare a note explaining this change for the committee's review.

Committee Action. Mr. Hafen asked for any other proposed changes to the proposed revision before submitting it for public comment. As no changes were proposed, the proposed revision of Rule 37 as contained in the meeting materials, with such amendments as noted above, was thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)-(3).

VI. ADJOURNMENT

The meeting adjourned at 6:03 p.m. The next meeting will be held on January 22, 2014 at 4:00 p.m. at the Administrative Office of the Courts.