UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – September 24, 2014

Present:	Rod N. Andreason, Hon. John L. Baxter, Scott S. Bell, Hon. James T. Blanch, Lincoln Davies, Hon. Evelyn J. Furse, Jonathan Hafen, Terrie T. McIntosh, Amber M. Mettler, Hon. Derek Pullan, Hon. Todd M. Shaughnessy, Timothy M. Shea, Leslie W. Slaugh, Trystan B. Smith, Paul Stancil, Hon. Kate Toomey, Barbara L. Townsend, Lori Wiffinden
Telephone:	David W. Scofield
Staff:	Timothy Shea, Heather M. Sneddon
Excused:	Hon. Lyle R. Anderson, Sammi V. Anderson, Steve Marsden
Guest(s):	Commissioner Michelle Blomquist

I. Welcome and introductions.

Jonathan Hafen welcomed the committee. Committee members and staff introduced themselves.

II. Rule 101. Motion practice before court commissioners.

Commissioner Michelle Blomquist presented the proposed changes to Rule 101, having received input from the lawyer community, the Subcommittee on Divorce, the Standing Committee on Children and Family Law, the Family Law Executive Committee, and the Board of District Court Judges.

Rule 101 governs the manner in which commissioners handle motion practice on domestic matters. Commissioner Blomquist explained that Rule 101 addresses the fact that commissioners hear 8-10 domestic matters each day, which often present issues and concerns that are not adequately addressed by the timeframes in Rule 7. Since 2010, the Subcommittee on Divorce has been receiving input from practitioners to propose changes to Rule 101 with the goals of streamlining divorce practice, addressing the issues that have been raised by practitioners regarding the current timeframes for filing and responding to motions, and making the timeframes consistent with the 7-day time periods that have been adopted elsewhere in the rules. Because of complaints from some practitioners regarding after-hours filing, the subcommittee proposes a 5:00pm deadline for all filings.

Commissioner Blomquist further explained that due to the large number of domestic matters heard by commissioners each day, the subcommittee requests a change to Rule 101 requiring practitioners to file voluminous exhibits as summaries pursuant to Rule 1006 of the Utah Rules of Evidence. The subcommittee also requests a page-limit on the total number of pages to be submitted with each memorandum, including affidavits, attachments and summaries, but excluding financial declarations and income verification. Upon consulting with the Board of District Court Judges, the subcommittee proposes a total page limit of 25 pages.

Other proposed changes to Rule 101 concern the requirements for affidavits and are otherwise meant to clarify the rule's requirements. The subcommittee would like to send the rule out for comment.

Discussion:

- Leslie Slaugh and Judge Pullan raised questions regarding line 78, which still references a total limit of 50 pages. Commissioner Blomquist informed the committee that the total limit requested by the subcommittee is actually 25 pages. That line will be changed to reflect a 25-page total, which will include up to 10 pages of argument for initial memoranda, as well as all attachments and summaries, with the exception of financial declarations and income verification. Many committee members discussed whether a 25-page limit will be followed by practitioners and enforced by commissioners, and the differences between civil and domestic practice, including the fact that commissioners are resolving factual issues upon motions. Judge Toomey suggested that the committee consider adding that overlength submissions will not be routinely granted, and that the limit on the total number of pages submitted to the court be applied to "each party."

- Judge Shaughnessy questioned whether the increase to a 28-day deadline for filing motions would restrict commissioners' ability to handle temporary order hearings. Commissioner Blomquist responded that a hearing currently cannot be set until 20 days after a motion is filed. In addition, most hearings are currently scheduled 3-4 weeks out. Quite a bit of debate has occurred regarding whether the deadline should be 21 or 28 days, but the consensus is 28 days. Commissioners still have the ability to hear and issue TROs when emergencies arise.

- Trystan Smith raised a concern regarding subsection (l) of Rule 101, and whether it is the current custom of commissioners not to require the presence of affiants or declarants at hearings. Commissioner Blomquist indicated that that is the custom, although it varies somewhat among commissioners. The intent of the addition is to clarify the rule.

- Leslie Slaugh raised the issue of whether a 5:00pm deadline should be imposed. Many committee members expressed their opinion that divorce lawyers should be subject to a midnight filing deadline, just like other practitioners. Mr. Shea advised the committee that the new Rule 6 permits e-filing up until midnight on the last day. Commissioner Blomquist mentioned that divorce practitioners' collective preference was to have a 5:00pm deadline, but the expanded timeframes in Rule 101 for filing and responding to motions may alleviate that issue.

- Mr. Slaugh also raised a concern regarding lines 19-22, which appear to permit the inclusion of additional factual material in a reply memorandum. In other areas of the law, reply memoranda are limited to argument. Judge Shaughnessy proposed that the language in Rule 7 regarding reply memoranda be adopted for Rule 101, i.e., a reply memorandum "shall be limited to rebuttal of matters raised in the memorandum in opposition."

- Mr. Slaugh indicated that one effect of the rule is that movants will have little or no incentive to file motions early given that deadlines are calculated from the hearing date as opposed to the date a motion is filed. Commissioner Blomquist explained that parties are able to schedule hearings rather quickly. Thus, for practical purposes, the manner in which deadlines are calculated does not make much of a difference.

- Judge Shaughnessy previewed his proposal regarding proposed orders in the context of Rule 101. Although Commissioner Blomquist sometimes receives proposed orders, typically she does not want them. She almost never uses them because they do not reflect stipulations that are made at the hearing. She does, however, need OSCs. Judge Shaughnessy and Mr. Hafen proposed that Rule 101 be left as is for now, leaving open the option to add a paragraph at the end regarding proposed orders.

- Mr. Shea recapped the committee's comments regarding Rule 101, suggesting that the rule be sent out for comment after further edits to reflect the language from Rule 7 regarding reply memoranda, a total page limit of 25 pages by "each party" on line 78, and the deletion of the 5:00pm deadline in subsection (j). Judge Toomey so moved. Judge Shaughnessy seconded. The motion carried, and Commissioner Blomquist was excused.

III. Case management pilot program.

Mr. Hafen began the discussion of the case management pilot program, indicating that significant feedback had been received regarding larger, complex case management concerns. Even with the new rules, larger cases are not reaching a timely disposition. To address that issue, some judges have expressed their willingness to be part of the case management pilot program, which will launch on January 1, 2015. Mr. Hafen is writing an article for the Utah Bar Journal to announce the program.

Judge Derek Pullan provided a brief explanation of the program. In summary, the rules do not accurately reflect what is happening in Tier 3 litigation. Parties are consistently stipulating around the requirements, which undermines rulemaking. While the Court does not want to alter what we've done, many of the complaints regarding Tier 3 litigation have merit. For example, if deposition limits are about to be reached, must parties return to Salt Lake City in the middle of a deposition in Chicago to obtain an order permitting extraordinary discovery before returning to take the remainder of the deposition? Judicial involvement in case management works, but to date, some judges have been reluctant to engage in active case management.

There is some tension between the pilot project and the proposed rule. While the proposed rule effectively removes judges from case management and creates limitations, the pilot program will implement a case management conference early in every Tier 3 case that is assigned to one of the volunteer judges in the program. Lead counsel will be expected to attend and parties will discuss what the case is about, what the discovery needs are, how issues might be narrowed, whether staged discovery is necessary, what the parties need from the court to assist in discovery disputes, and how to address e-discovery issues. The idea is that, as a result of the conference, parties will agree to deadlines, including a dispositive motion deadline, and those deadlines will be firm unless a true emergency arises. After 1-2 years of the program, the results from those cases will be compared to cases from a control group of judges who were not part of the program to determine whether we have developed a set of best practices that all trial judges can use. Judge Pullan is hoping that the program will confirm that judicial case management works and that the remainder of the bench will be persuaded to implement more active judicial case management.

Discussion:

- Judge Pullan mentioned that another judge from the Third District is needed for the program. The committee discussed whether a 100% civil calendar is required of volunteer judges for accurate comparisons to be made. The judges on the committee indicated that they will discuss the issue amongst themselves and attempt to locate another volunteer judge.

- Mr. Slaugh suggested that more case management conferences may be necessary, as parties often do not know enough about the case in the beginning to set hard deadlines. Judge Pullan indicated that more conferences may be difficult to implement. If only soft deadlines are imposed up front, is there any point to judicial case management? The committee discussed this issue at length, as members raised concerned that we strike the right balance between receiving input from lawyers on deadlines once they understand their case and making adjustments as cases unfold, on one hand, and needing to impose hard deadlines if they are to be taken seriously, on the other.

- Paul Stancil expressed his enthusiasm for the pilot program, but had concerns:

  (1) Fit: Tier 3 may not actually capture what we want to capture. Just because a lot of money is at stake doesn't necessarily reflect the dynamics of litigation. Mr. Smith likewise questioned whether the program is targeting the type of case that needs judicial management. Judge Pullan agreed, but questioned how we might tease out these issues in any other way that creates predictable lines. Prof. Stancil responded that the relevant, generalizable dynamic is cost disparity. That's where problems arise because parties engage in strategic behavior. Mr. Hafen mentioned that cost disparity would be difficult to determine. If the determination of which cases fall into the program is too complex, it will not work. Prof. Stancil confirmed that he is not suggesting a case-by-case determination.

  Judge Pullan mentioned that Tier 3 cases will always receive active judicial case management, and perhaps parties in other cases can request it through a motion. Cost disparity will be an issue.

  (2) If the pilot program is run by volunteer judges, it is likely to create the best possible scenario in terms of outcome. Will it be fair to generalize those outcomes to the bench as a whole?

  (3) Is case resolution or time to trial the end we are trying to reach, or some other end like justice?

  (4) Expand the measures of success to include party satisfaction. If the parties who participated in the program (as opposed to lawyers) enjoyed it more than those who went through the normal process, that may be a more powerful indicator that the program works than lawyers' opinions. Judge Toomey agreed with this point.

- Judge Shaughnessy suggested that if parties are told that they will not receive extensions, they will ask for more time than they need at the initial conference. Mr. Bell wondered whether that may still result in quicker resolution of cases than repeated extensions. Magistrate Judge Furse proposed setting higher standards for obtaining extensions. Rather than "good cause," she suggested "excusable neglect." Mr. Shea informed the committee that the pilot program proposes "exceptional and unanticipated circumstances" to obtain extensions.

- Mr. Smith asked what our next steps are after completing the pilot program. Mr. Hafen indicated that if we receive positive responses from lawyers, parties and judges, we will look at amending Rule 26. Mr. Shea mentioned that one of the goals is to see if judges can manage cases, and how many they can actively manage. Different cultures currently exist in different districts; for example, the Second District is doing much of this already. The Institute for the Advancement of the American Legal System produced an outline based on interviews with judges in the practice of managing complex cases, and we are using that outline as the starting point for our program.

- Mr. Bell raised a concern regarding the requirement for lead counsel to be present for the case management conference, as well as for motions and discovery disputes. It could be more expensive and take away experience opportunities for younger lawyers. Mr. Shea commented that it may give the parties the motivation to resolve the case by impinging on lead counsel's schedule, and the program is meant to encourage judges to make themselves available for telephone conferences. Magistrate Judge Furse expressed her preference that lead counsel attend hearings. Although she has encouraged younger lawyers to handle hearings to gain experience, she is curious as to whether requiring lead counsel to attend will elevate the issues more quickly and lead to quicker resolutions.

- Prof. Stancil raised the current debate on the federal level regarding proportional discovery. The federal advisory committee is considering amendments to Rule 26 to require judges to account for proportionality concerns as part of the initial discoverability piece. It is likely to end up in the federal rules. Mr. Hafen considers that good news, as the original paradigm was meant to achieve proportional discovery.

- Mr. Shea raised the Court's question of how we measure improving costs for the client. Data may be gathered from surveys and the court's case management system, but we need to determine how to best measure costs. Should lawyers in all Tier 3 cases, both control group and pilot program cases, be surveyed? The committee discussed this issue at length. Members raised many concerns: whether plaintiffs' lawyers in tort contingency cases track their time; whether surveys regarding costs would irritate lawyers; whether lawyers would accurately report costs; whether no data is better than inaccurate data; whether we would receive enough responses from lawyers to apply them across the board given that prior inquiries of this nature have not been successful; and whether the information might become public. Magistrate Judge Furse proposed that we consider using hearings and motions as proxies to estimate costs, assigning averages to each. Mr. Shea confirmed that the court's database can be queried to determine the number of deposition notices and motions filed, etc. Prof. Stancil commented that this could be done, and that the cost estimates would be pretty reliable. Mr. Hafen expressed the committee's general sentiment to go with Magistrate Judge Furse's proposal, with Prof. Stancil's input, to determine costs.

- Mr. Shea informed the committee that the Court has already given the green light to this pilot program. Mr. Hafen proposed that the committee eliminate the fee-reporting requirement, confer with the pilot judges and get the program launched. He will complete the Utah Bar Journal announcement regarding the program.

IV. Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.
Rule 54. Judgments; costs.

Rule 58A. Entry of judgment; abstract of judgment.
Form 22. Judgment.

Mr. Shea reported that conversations with the Court have occurred because we are asking the Court to shift direction. Our proposal will be reviewed by the advisory committee for the Rules of Appellate Procedure. The Court would like to change the introductory phrase to Rule 7, lines 86-95, for clarity. Mr. Shea has rewritten the phrase to confirm that a decision is not final if the judge says it's not final in some manner. Otherwise, a decision is final when it is signed. Silence equals finality.

Discussion:

- Judge Shaughnessy raised a concern regarding the rule's language and the issue of "finality." Does use of the term "final" create ambiguity as to whether Rule 7(j)(1) pertains to a final order, i.e., the final word on a motion, but not necessarily a final *appealable* order? A ruling on a motion could be "final" but interlocutory. Mr. Shea suggested using the term "complete" throughout Rule 7 instead of "final," with which Judge Toomey agreed. Judge Shaughnessy responded that the rule needs to make clear that if a party wants a final appealable order, the party must look to Rule 58. Mr. Shea said that is included in a committee note. Magistrate Judge Furse suggested that the term "final" also brings into question the court's authority to revisit its decisions on motions. Mr. Shea and Judges Shaughnessy and Pullan commented that if the court asks a party to prepare a judgment following issuance of a memorandum decision, and no judgment is prepared, the memorandum decision served is final in 150 days. A party has 30 days from that date in which to appeal. Mr. Hafen questioned whether using "complete" would provide sufficient clarity and posited that perhaps a more explicit introduction that final appealable orders and judgments are governed by Rule 58A is in order. Mr. Shea proposed that "matter" on line 92 be changed to "motion," to avoid confusion regarding finality for the whole case.

- The committee also discussed the term "register of actions" in line 93 and its meaning. Mr. Shea said that the term is used elsewhere, and is intended to mean the docket.

- Mr. Shea will make further edits to Rule 7 incorporating the committee's comments, and prepare an advisory committee note that describes completeness as the disposition of a motion. Ms. McIntosh proposed that on line 89, the rule refer to a proposed order "confirming a decision on a motion."

- Judge Shaughnessy said that he was responsible for the naming conventions for memoranda under Rule 7, but now dislikes them as too long and unwieldy. The committee discussed amending lines 37-38 to reference "a Memorandum in Opposition to (or Opposing) . . .," and lines 52-53 to reference "Reply Memorandum in Support of Motion to . . . ."

With respect to Rule 54, Mr. Shea reported that it is quite similar to its federal counterpart. Line 3 describes a judgment in an affirmative sense, which the federal rule does not do. The Court has suggested adding "any other order from which an appeal of right lies" to the end of lines 3 and 4 to distinguish it from a petition to appeal an interlocutory order. Mr. Hafen invited comments and suggestions from the committee.

Discussion:

- Judge Toomey proposed the addition of a rule regarding attorneys' fees. While there is a 14-day deadline to claim costs, there is no such deadline to claim fees, which creates a finality issue. Rule 73 might be an appropriate place to add a 14-day deadline to claim attorneys' fees.

Concerning Rule 58A, Mr. Shea reported that it is also similar to the federal counterpart. The Court agrees that setting out a judgment in a separate document is a sound approach to clearly marking the beginning of a party's right to appeal. The Court wants to use the term "judgment," but many statutes describe "orders" as resolving all issues for all parties. Changing the naming convention on a broad scale would be difficult. Thus, the proposed amendment references a document "ordinarily titled Judgment . . . or Decree." Mr. Shea also mentioned the exceptions to the requirement of a separate document, which are not actually judgments. As identified in subparagraph (b)(2), however, a separate document would not be required for judgments under Rule 54(b). Rule 54(c) sets forth the process for preparing a judgment, which will typically be undertaken by the parties. This differentiates our rule from the federal rule. The time of entry is modeled after the federal rule, however, and other stylistic changes have been made to the rule.

Discussion:

- Ms. McIntosh identified an omission in line 94; the language doesn't make sense. Mr. Shea may need to rearrange it. Mr. Bell suggested that the paragraph beginning with line 105 be moved to the end of the sentence that ends on line 100.

- Judges Toomey and Shaughnessy raised the issue of the amendments changing prior decisions of the Court, and proposed that an advisory committee note indicate that the amendments are in response to a directive from the Utah Supreme Court to resolve issues in the former rule.

- Judge Pullan questioned whether the exceptions in subparagraph (b) needed to remain in the rule, as they are not "exceptions" so much as they simply are not judgments. Many committee members offered their opinions on this issue, including that the federal rule includes these exceptions; listing them does not hurt; the exceptions provide clarification regarding post-judgment motion rulings, i.e., that a separate judgment is not required after that. Others believed that the exceptions create confusion rather than clarity. Judge Shaughnessy commented that with respect to post-trial motions, the denial of the motions triggers the appeal period as opposed to a "second" judgment, which must be clear. Judge Blanch asked how we provide that clarity without injecting confusion with respect to other orders. Mr. Shea directed the committee to Rule 4 of the Appellate Rules of Procedure, which explains that the time for parties to appeal from a judgment runs from the entry of the order disposing of post-trial motions.

- Judge Toomey proposed an addition to line 12: "every judgment or amended judgment *resolving a case*." This would prevent parties from wrongly believing that the denial of a motion for leave to amend requires a separate judgment. Judge Shaughnessy suggested that in the committee note, under subsection (a), the committee explain what is covered, and then indicate that subsection (b) is modeled on the federal rule to make clear that a separate judgment is not required in those instances and the time to appeal runs from entry of an order denying post-trial motions. The committee should then refer practitioners to Rule 4 of the Appellate Rules of Procedure. Mr. Hafen and Judge Toomey agree.

V. Adjournment.

The meeting adjourned at 6:00pm. The next meeting will be held on October 22, 2014 at 4:00pm at the Administrative Office of the Courts.