UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – November 19, 2014

Present:	Terrie T. McIntosh, Leslie W. Slaugh, Rod N. Andreason, Amber M. Mettler, Scott S. Bell, Hon. Kate Toomey, Jonathan Hafen, Trystan B. Smith, Lincoln Davies, Hon. James T. Blanch, Hon. Todd Shaughnessy
Telephone:	Paul Stancil, Hon. Derek Pullan, Hon. Lyle R. Anderson
Staff:	Timothy Shea, Heather M. Sneddon
Not Present:	Hon. John L. Baxter, Hon. Evelyn J. Furse, Steve Marsden, Sammi Anderson, David W. Scofield, Barbara L. Townsend, Lori Woffinden

I. Welcome and approval of minutes. [Tab 1]

Jonathan Hafen welcomed the committee and the minutes were offered for approval. After corrections to the list of attendees, Judge Toomey moved to approve the minutes. Mr. Andreason seconded and the minutes were unanimously approved.

II. Responses to circulation of Rule 7. [Tab 2]

Tim Shea identified two comments that were received regarding Rule 7. The first concerns whether a counterclaim should be recognized as a pleading in Rule 7(a). Neither the current URCP rule nor the FRCP rule does so.

Discussion:

- Many committee members considered it odd that a counterclaim is not identified as a pleading in subsection (a). Judge Toomey mentioned that a fee is even required to file a counterclaim.

- Mr. Slaugh questioned whether a counterclaim exists on its own other than as part of an answer. Mr. Andreason mentioned that occasionally a counterclaim is a stand-alone document, but usually it's part of an answer. Mr. Hafen asked whether we are disallowing counterclaims by not including them in answers. Mr. Slaugh pointed out that counterclaims may be filed separately, even though Rule 13(e) seems to contemplate that counterclaims are part of an answer.

- Mr. Davies tells his students that it's odd that counterclaims are not listed in the federal rule. He believes the rule identifies a complaint and answer and then lists several kinds, including counterclaims and crossclaims, then a reply.

- Judge Blanch said that counterclaims join issues in the case. They are no different than other documents that accomplish the same thing, and exclusion from Rule 7 makes little sense.

- If counterclaims are added, Mr. Hafen questioned whether we need to also add crossclaims.

- Mr. Smith questioned whether counterclaims are simply a different term of art than complaints and are not pleadings. Mr. Slaugh and Judge Toomey responded that, oftentimes, counterclaims end up being the dominant pleading in a case.

- Mr. Shea commented that he is not inclined to make a change because Rule 13 treats counterclaims and crossclaims as part of another pleading, i.e., they can be included in any other pleading.

- With no objections, Mr. Hafen stated that Rule 7(a) will be left as is.

Mr. Shea identified the second issue with respect to Rule 7, raised by Ms. Mettler: Will judges be overwhelmed with attachments if parties "must" attach an appendix of relevant portions of documents cited. What about cases and pleadings already on file?

Discussion:

- Mr. Andreason agrees with Ms. Mettler. The proposed amendment exceeds what is in the local federal rule. If we are required to include as attachments everything that is cited, our filings will be huge. The local federal rule says nothing about opinions, statutes or rules. Ms. Mettler commented that the appendix should include only things that the court would not otherwise have. Mr. Andreason suggests changing the amendment to be consistent with the local federal rule.

- Mr. Slaugh commented that the purpose of this is to dovetail with the rule adopted years ago prohibiting the filing of discovery materials. If the motion cites evidence of record, filing an appendix puts that evidence in the record. Mr. Davies agreed; opinions, statutes and rules are not evidence. As such, Mr. Hafen suggested those be excluded from the appendix, which is consistent with the local federal rule. Judge Blanch commented that unpublished opinions could be included if not available through Westlaw, but otherwise, the court has access to Westlaw and does not need copies of cases attached. Mr. Slaugh indicated that it is a question of advocacy, not requirement.

- Mr. Hafen suggested copying the local federal rule to be wholly consistent. Mr. Slaugh agrees; the local rule identifies what must be attached. Judge Toomey commented that things were different before electronic filing. Judges may have looked at copies of cases then, but it is easier now to look at the memorandum and Westlaw in parallel on screen.

- Mr. Andreason moved to replace the Rule 7 language regarding the appendix with the language from the local federal rule. Mr. Shea suggested leaving out "when filed and served." Judge Toomey so moved, Mr. Bell seconded and the motion passed with unanimous consent.

Mr. Hafen met with the Appellate Rules Committee regarding Rule 7. They had a variety of concerns, particularly with respect to enforcing orders/judgments. These issues, however, are not resolvable based on our proposed amendments to Rule 7. Even so, the Appellate Rules Committee would

like clarification in Rule 7(j)(1) on when the time starts for appeal purposes. Mr. Shea recommends addressing this issue in the committee note rather than adding it to the rule.

Discussion:

- Mr. Slaugh proposed adding to the rule: "Court's decision is complete when signed by the judge unless the judge directs further action" or "unless otherwise directed by the judge." If the decision or ruling needs a follow-up ordef, the judge may choose to have the parties prepare it, but our proposed rule doesn't give the judge the leeway. Mr. Hafen pointed out that the language Mr. Shea has proposed to add to the committee note is too unwieldy to put in the rule itself. Mr. Slaugh suggested that perhaps not all of that language is needed.

- Mr. Shea expressed his hesitancy to adopt Mr. Slaugh's proposal. Under the structure we've set up, a decision, whatever it is called, is complete when signed. It may or may not be appealable at that point, however. He would hate to go back to including some condition of a further directive affecting the "completeness" of that decision. Mr. Slaugh recognized that if a judge directs a party to prepare an order, the judge's action is still complete but the order is not appealable until someone prepares it. Messrs. Hafen and Shea agreed.

- Mr. Smith raised the difference between the date when a decision is signed versus when it is entered on the docket. Mr. Shea recognized that they are becoming terms of art (as suggested by Mr. Bell). What we've called a "complete" decision still has to be entered on the docket by the clerk. Under URAP 5, the time in which to file a petition for permission to appeal that decision is 20 days from when it is *entered*. Thus, the decision is complete when signed but may require further implementation before it is appealable. That is the structure Mr. Shea has used in drafting.

- Mr. Hafen raised the addition of Mr. Shea's language to the committee note. Mr. Slaugh so moved and Mr. Smith seconded. The motion passed with unanimous consent. Mr. Shea will report to the Appellate Rules Committee and publish Rule 7 and the committee note for comment.

- With respect to objections, Mr. Smith questioned whether we should leave the 2-day deadline to file an order after receiving an objection (and to file a response to that objection), or change it to 7 days under Rule 7(j)(5)(C). Mr. Slaugh commented that the current rule simply says "after" the objection with respect to when to file the proposed form of order. Mr. Hafen liked the idea of including a deadline. Mr. Slaugh stated that there is no penalty for filing the form of order (or response) late. Judge Blanch commented that responding to an objection is what takes time. Mr. Smith moved to extend the time for filing the form of order and a response to an objection to 7 days, Blanch seconded, and the motion passed unanimously.

- Mr. Shea stated that Rule 58A has the same 2-day provision regarding judgments, and proposed the same change. All agreed. They will be sent out for comment.

III. Consideration of comments to Rules 5, 26, 30, 37 and 45. [Tab 3]

Mr. Shea looked into the issue of filing private documents and learned that there is a way to electronically file them and request that they be classified as private. Such documents will go to the other party, but will not be viewable by the public. Thus, Mr. Bogart's comment is not quite right. Mr. Shea

believes Mr. Bogart's concern has been addressed, although he may not be aware. Currently, however, there is no way to electronically file a "safeguarded" record, i.e., one that will *not* be served on the other parties. There are only a handful of such documents—mostly related to domestic violence victims, juror names, etc., that are automatically so designated. Mr. Shea does not recommend implementing a process to file other records as "safeguarded" through electronic filing, as that may result in many improper "safeguarded" filings. No one proposed any changes with respect to this issue.

Mr. Shea also identified the comments regarding Rules 5, 26, 30, 37 and 45, including the various opinions concerning whether consent should be required to serve parties via email. Mr. Shea is in favor of email service without having to seek consent—that is the new age.

Rule 5. As Mr. Shea described, "Superman" commented that the rule should not require documents to be served before or on the same day as filed, as set forth in line 48. Mr. Shea mentioned that we are moving toward the filing of documents as the triggering date for responses, not service. They are more or less simultaneous now with electronic filing. Superman's "11:58 pm" filing scenario isn't particularly realistic, but his description of temporary order motions being served with petitions for divorce is.

Discussion:

- Mr. Slaugh stated that he believed the prior rule just required service "soon after" filing. Mr. Andreason commented that on bigger cases, it is definitely more conceivable that 11:58 pm filings will occur. Mr. Hafen questions whether this is really an issue. Mr. Davies commented that it could be an issue with respect to service on pro se parties. Mr. Shea pointed out that, currently, the rule focuses on service with filing to occur within a reasonable period after. Mr. Slaugh suggested that we stick with the reasonable time concept. Judge Toomey and Mr. Hafen believe a "reasonable time" is too loose.

- Judge Blanch commented that we want to encourage people to file and serve on the same day, so the rule should reflect that. No one disagreed, so the rule will remain unchanged.

- Ms. McIntosh liked the style change proposed by Mr. Whittaker on line 49, which Mr. Shea is okay with. Ms. McIntosh also identified his proposed change to line 68 concerning service by other means being effective upon delivery. The proposed rule says only that service by electronic means is complete upon sending. Judge Shaughnessy mentioned that the rule is merely meant to clarify. The committee agreed that the rule as drafted is sufficient.

- Mr. Slaugh raised Mr. Whittaker's comment concerning lines 75-76: He believes every paper required to be served must be served by the party *filing* it (rather than preparing it). Same with line 76. Mr. Slaugh is not concerned with the court in line 76, but suggested that a change to line 75 makes sense. Ms. Mettler commented that she prepares discovery that she never files. Mr. Hafen proposed to leave "preparing" in the rule. No objections.

- Ms. McIntosh addressed Mr. Whittaker's comment to line 114, where the rule says "e-filing." "Electronic filing" is used everywhere else. The committee agreed to change that to electronic filing.

- Mr. Davies raised Mr. Whittaker's suggestion for the committee note. Mr. Davies wants to balance what we really have to explain. Mr. Hafen commented that we need to explain when

we're making a change or there is a particularly thorny issue. Mr. Whittaker's proposal sounds more like minutes. Ms. McIntosh agreed; it doesn't provide an interpretation, only a defense of the committee's rule change. Mr. Smith commented that Rule 5 is not that complicated. The committee agreed to leave the committee note as is.

Rules 26 and 30. With respect to Rule 26, Mr. Shea believes the comment from Mr. Schriever is mistaken. Our change to Rule 26(c)(6) refers to the statement of discovery issues under Rule 37(a), which does not require misconduct, bad faith or non-disclosure. No comments were received on Rule 30.

Rule 37 Discussion:

- Mr. Shea mentioned Mr. Dahl's comment concerning the relationship between Rules 37 and 45. Mr. Shea changed "motions" to "requests" given that discovery issues are now governed by the Statement of Discovery Issues under Rule 37(a), which itself is not technically a "motion." Mr. Shea is not sure if this is sufficient and is open to suggestions, but wants to channel people to Rule 37(a). He made the same change in a few other places. Mr. Smith commented that it will take a bit of education, but he likes the change. The committee agreed with the change.

- Mr. Shea also relayed Mr. Sipos' comment expressing confusion regarding "attachments as required by law" in line 60. Mr. Shea mentioned that the Third District Court bench meeting could not think of an example, but out of an abundance of caution, included this language. The committee likewise could not think of any examples and, therefore, proposed to remove the language as likely to cause confusion and unnecessary argument. Mr. Shea asked whether the committee needed to address the second line, beginning at line 62. Mr. Andreason stated that the second line was much more clear, but Mr. Shea and Judge Shaughnessy propose removing the second line. The committee agreed to remove the second line of Rule 37(a)(4).

- Mr. Shea indicated that Mr. Whittaker suggested several changes to the proposed text. Judge Toomey stated that the current draft, as written, was fine without the changes.

- Ms. McIntosh questioned what is a "permitted" attachment, as some commenters had asked. She proposed changing the heading to Rule 37(a)(4) to "Permitted Attachments." All agreed. Ms. McIntosh also mentioned line 69, which references Rule 7(d) that is now 7(g). Mr. Shea will make the necessary changes.

- Mr. Shea raised Mr. Nadesan's comment that the statement of proportionality (at line 53) should not be required when requesting that the court exclude evidence that was not disclosed. Mr. Shea thinks this makes sense. Mr. Slaugh commented that that is difficult to achieve from a drafting standpoint. Mr. Smith agreed. Judge Shaughnessy questioned the context in which this would arise—wouldn't it be a motion in limine? The committee discussed at length whether excluding witnesses or testimony should be addressed through statements of discovery issues or motions in limine. Judge Blanch commented that in reality, if evidence is going to be allowed, it will likely be addressed in the context of a motion in limine, not a separate statement of discovery issues. Judge Shaughnessy said that redrafting the rule to account for this scenario makes little sense.

- Mr. Nadesan also commented that Rule 37 fails to say that it is the sole rule for addressing discovery disputes. Mr. Slaugh mentioned that the new proposed Rule 7 states that discovery

motions must be brought under Rule 37. Mr. Shea confirmed that to be the case, but stated the new Rule 7 has not yet been published for comment.

- Mr. Shea raised Mr. Bogart's comment that it is burdensome to require a nonparty to come to the forum of the parties to seek protection or defend objections. The committee has discussed this – it should be the court where the action is pending. Mr. Slaugh commented that since it is usually handled through telephone conference, it doesn't seem particularly burdensome. Judge Shaughnessy also commented that the requirement doesn't apply to out-of-state parties because such subpoenas must be domesticated and the party must go to the out-of-state court.

- Ms. McIntosh raised Mr. Whittaker's comment on Rule 37, line 106. We have changed expenses to costs, but "costs" are often read as taxable costs, which are much narrower than expenses. In contrast, line 139 addresses motions for attorneys' fees and expenses. Mr. Slaugh and Judge Shaughnessy are in favor of going back to expenses. Mr. Smith expressed his concern that "expenses," to him, mean anything and everything, whereas costs have a definition. Expenses could be huge on a statement of discovery issues, which may be opening the door to something much bigger than the committee was contemplating. The idea behind the statement of discovery issues was to resolve discovery disputes inexpensively and efficiently. Mr. Slaugh pointed out that the phrase "on account of the statement of discovery issues" does not cover a failure of discovery. Judge Shaughnessy described a scenario where a party wants expensive extraordinary discovery that doesn't fit within the definition of "costs"; he wants the ability to permit that discovery but require the party requesting it to pay for it. Judge Blanch commented that costs are automatic, whereas expenses are awarded in the context of "reasonableness." Mr. Shea stated that he believes Judge Shaughnessy's point is covered by lines 98-99. Judge Shaughnessy asked why costs are included in those lines. Mr. Smith responded that those lines deal with something different—whether 2 or 4 depositions are appropriate, for example. Mr. Hafen suggested changing lines 105-06 to pay the other party's reasonable costs, expenses or attorneys' fees, making discretion built-in. Judge Shaughnessy commented that that would make lines 105-06 parallel lines 98-99, although in a different scenario. If different language is used, attorneys will highlight that difference. Judge Blanch recommended leaving financial issues to the judge's discretion, and not limiting to defined "costs." Mr. Shea summarized Mr. Hafen's proposal as copying lines 98-99, including them in lines 106 and 114, but with an "or." Mr. Shaughnessy proposed to make that change throughout the rule to make it consistent. The committee agreed.

- Ms. McIntosh also raised lines 105-06 in Rule 37: Although it discusses "other party's" expenses, a nonparty may also be affected. Mr. Shea proposed to delete "other party's" from the rule. Mr. Hafen agreed. Mr. Slaugh asked whether line 105 should say "party" or "person." He believes this wouldn't be used against a nonparty, as that would be handled through an OSC for contempt. Jurisdiction over the nonparty would have to be obtained. Given that, Mr. Shea questioned whether "other party's" should be reinstated. The committee decided not to include "other party's."

- Mr. Slaugh raised line 107, which only permits recovery "on account of" the statement of discovery issues, not the underlying abuse. Judge Shaughnessy suggested that's what "on account of" really means. Mr. Slaugh suggested changing the language to say "on account of discovery issues." Judge Shaughnessy responded, saying that the existing rule allows judges to tag lawyers with expenses for the underlying abuse. "On account of" is broad enough.

Rule 45 Discussion:

- Mr. Shea raised Mr. Sanders' recommendation of a minimum time frame for serving third-party subpoenas. Mr. Shea suggests 7 days. Mr. Slaugh recalled that the issue had been discussed a year ago, but the decision was not to add a timeframe. The federal rule requires 8 days notice by mail, 5 days electronic. The problem with adding 7 days is that parties already are required to give 14 days' response time to the third-party. If another week is added, they will have tremendous lead-time on subpoenas when we have already limited the fact discovery period. Mr. Smith commented that under the current rule, you already have to give notice, you just don't have to serve the actual subpoena. By the time you get through the whole process, it's a while. Mr. Shea mentioned that if the rule is changed, it would require actual service of the subpoena. The committee's sentiment is not to change the rule.

- Mr. Shea commented that with respect to line 19, we no longer have a subpoena appended to the rules. The court website, however, includes a webpage on subpoenas, including subpoenas out-of-state, subpoenas for states that have enacted the Uniform Subpoena Act, etc. Mr. Shea suggested referencing a court-approved form. Judge Toomey agreed. Mr. Slaugh proposed the addition of a committee note with a link to where the form can be found.

- Ms. McIntosh raised a question regarding the added committee note language regarding nonparties affected by a subpoena. They're advised to request a protective order, but the rule says they may send a letter with the burden shifting to the party who served the subpoena to file a motion. She proposed the removal of that sentence from the note (at line 145). Mr. Slaugh agreed; the current rule says that a nonparty served with a subpoena may object, which ends their obligation to produce. They are not required to file a motion (line 100). Judge Shaughnessy stated that a nonparty has two choices: (1) send a letter objecting, or (2) move to quash. Ms. Mettler mentioned the rule: a party "shall" while a nonparty "may" move to quash. Mr. Bell commented that if you're objecting, you're not moving to quash. Ms. McIntosh said that nonparties should have both choices. Judge Shaughnessy commented that the point of the committee note is to direct nonparties to the statement of discovery procedure. The procedure for quashing a subpoena is set forth in Rule 37(a), the statement of discovery issues. The committee entrusted Mr. Shea to make these changes to the rule.

Judge Toomey moved to approve all rules as modified by the discussion. Mr. Davies seconded, and the motion carried unanimously.

IV. Rule 43. Evidence. [Tab 4]

Mr. Shea reported that Rule 43 is a proposal from the Judicial Council, which is the result of a study by the Ad Hoc Committee. They examined the use of video technology for remote appearances at hearings. In theory, the judge could be the one remotely attending, but a rule is needed for parties and lawyers. The rule would, as drafted, mirror the federal rule. In a separate Judicial Council rule, the definition of contemporaneous transmission will include the concept that everyone can see and hear everybody else. There should also be the ability to have private communications between clients and their counsel. If concerns exist, perhaps a court clerk or proctor could be required to be present with a remote witness. Recently, testimony was given from a hospital bed. In other words, remote appearances are occurring but there are no rules to regulate them. Based on his research, appellate courts are willing to honor the application of a rule or statute on this issue so long as it doesn't impinge on constitutional

rights. But if there is no rule, then appellate courts will not honor it. A challenge to the practice would probably be upheld.

Discussion:

- Judge Shaughnessy is in favor of adopting a rule. He proposed including a note that explains the rule and what appropriate safeguards are. Mr. Slaugh commented that appropriate safeguards are better left to the discretion of the judge. Mr. Andreason agreed.

- Mr. Slaugh also suggested dropping "compelling circumstances"; he believes good cause and appropriate safeguards are enough. Mr. Shea commented that the Juvenile Committee went the other way—they kept compelling circumstances and got rid of good cause. Mr. Hafen stated that the circumstances should be pretty compelling because live witnesses are much better, including for cross-examination purposes.

- Judge Toomey asked about stipulations. Mr. Shea reported that the Judicial Council was in favor of leaving it to the judge's discretion in all circumstances. In other words, the parties may not stipulate around the judge's discretion; a judge cannot be compelled to allow it.

- Judge Pullan asked whether a companion rule exists in the Rules of Criminal Procedure, as it would present confrontation issues. And the URCP apply unless there is a criminal rule that conflicts. Mr. Shea stated that a proposed criminal rule is going through the criminal rules committee. There is no national model to follow on the criminal or juvenile side. The Ad Hoc Committee came up with a handful of hearing types that would require consent of the parties, as well as the judge, and then a handful of hearings when the judge could simply do it without the parties' consent. The juvenile rule took the same approach. The criminal rule is still being developed while the juvenile rule is done and will be published for comment soon.

- Given that backdrop, Judge Pullan recommended that our committee not act until the criminal rule is in place, because it will introduce mischief into criminal cases. If we go first, this rule will apply in criminal cases. Mr. Shea proposed staging the rules and then submitting them as a package to the Supreme Court for approval (civil, criminal and juvenile). A sound approach would be to edit the rule as we see fit, send for comments, and then we'll hold back until we are prepared to submit all three rules from all three committees.

- Looking at the model on the criminal side, Judge Pullan asked whether there are any civil hearings where we would never permit remote appearances. The committee discussed several types of hearings and cases that might never qualify for remote appearances, but concluded that the circumstances would vary such that it should be left to the discretion of the judge rather than identifying types of hearings/cases in the rule. Judge Shaughnessy agreed to write a committee note that explains the rule, the pitfalls and appropriate safeguards and other requirements. Mr. Bell mentioned that while serving as a small claims judge, he has permitted a witness to appear via Skype. Mr. Shea commented that as remote appearances become more prominent, and we become more comfortable with the technology, interstate jurisdiction issues may become a thing of the past. Mr. Slaugh mentioned that there is an extensive committee note on that issue in the federal rule, which addresses the concerns raised by Judge Shaughnessy. Mr. Hafen asked whether the committee should consider a draft note before the rule is sent out for comment. Judge Shaughnessy favored a draft note.

- Mr. Shea raised line 5, as the committee needs to address good cause/compelling circumstances. He is inclined to go with compelling circumstances. Mr. Slaugh commented that the federal rule provides: "good cause in compelling circumstances." Mr. Smith was in favor of adopting the same language. Judge Pullan mentioned the possibility of a case with compelling circumstances, but the reason comes down to lack of diligence. Mr. Smith further commented that the reasons must be more than the fact that live appearance is costly. Mr. Davies commented that the advantage of using the federal language is that case law will have built up around that language that can be used as a guidepost. Judge Blanch commented that we generally track the federal rules unless there is a good reason not to. Mr. Shea mentioned that the note could explain that the rule is intended to cover the same base as the federal rule. Mr. Hafen stated that because there is some value in sticking with the federal rule, even if it is not what we would have chosen, he proposes leaving the rule as is for now and taking it up at the next meeting in conjunction with the committee note.

V. Adjournment.

The meeting adjourned at 5:55 pm. The next meeting will be held on January 28, 2015 at 4:00pm at the Administrative Office of the Courts.