Minutes

Advisory Committee on the Rules of Civil Procedure

March 25, 2015

Present: Lyle Anderson, Rod Andreason, James Blanch, Lincoln Davies, Evelyn Furse, Jonathan Hafen, Presiding, Terrie McIntosh, Derek Pullan, David Scofield, Leslie Slaugh, Trystan Smith, Paul Stancil, Barbara Townsend, Lori Woffinden

Excused: Sammi Anderson, John Baxter, Scott Bell, Amber Mettler, Heather Sneddon, Kate Toomey

Staff: Tim Shea,

Guests: Frank Carney

(1) APPROVAL OF MINUTES.

The minutes of February 25, 2015 were amended to show Mr. Andreason as excused. The minutes were approved as amended.

(2) CONSIDERATION OF COMMENTS TO RULE 7.

Mr. Shea reported that he had edited the draft based on the discussion at the last meeting. The further changes are highlighted in this month's draft.

Regarding paragraph (g), request to submit for decision: The committee decided not to define the completion of briefing, but to add to the content of the request to submit for decision the date on which a response to objections raised in the reply memorandum had been filed.

Regarding paragraph (i), notice of supplemental authority: The committee decided not to describe the notice as a "letter," but because the notice will take the form of a pleading, to permit up to two pages, rather than one. The committee discussed how best to bring the notice to the judge's attention. If the notice is electronically filed, it will be categorized as "other," and will not be directed to the judge's work queue. Mr. Shea will request that the e-filing system be modified to create a document type of "notice of supplemental authority" and that the document be directed to the judge's work queue.

Regarding paragraph (l), motions that may be acted on without waiting for a response: The committee discussed how best to describe motions that can be acted on without waiting for a response. The specific motions discussed at the last meeting include a motion to permit an overlength motion or memorandum, a motion for an extension of time, and a motion to appear pro hac vice. Mr. Shea reported that Mr. Bell was unable to find the list of motions that he had mentioned at the last meeting. Mr. Shea reported that rules from other jurisdictions used the term "procedural" motions. The committee decided on "other similar motions."

Regarding paragraph (n), motion in opposing memorandum or reply memorandum prohibited: Mr. Andreason recommended changing "The proper procedure is to include in the subsequent memorandum an objection to the evidence" to "Instead, the party must include in the subsequent memorandum an objection to the evidence." The committee approved the change.

Regarding paragraph (o), overlength motion or memorandum: Ms. McIntosh recommended deleting the sentence "The court may act on the motion without waiting for a response" because this motion is listed in the earlier paragraph. The committee approved the change.

The committee decided that the plural of memorandum should be the Latin "memoranda," rather than the English "memorandums." Two datums were cited for the preference.

The committee approved the remainder of the further changes. The committee discussed whether to again publish the rule for comment. The committee decided that all of the further changes were in response to suggestions made during the comment period and that the rule did not need to be

republished. The committee recommended that the Supreme Court approve the rule, along with Rule 54 and Rule 58A.

(3) RULE 43. EVIDENCE.

Mr. Shea reported that the proposed amendment is from a committee of the Judicial Council that recommends using technology to conduct hearings and provide services remotely. He said that 15 courthouses are being fitted with sound systems, cameras and monitors. The criminal rules committee and the juvenile rules committee are considering similar rules for those cases, and the Judicial Council has a draft rule to describe the minimum requirements of a quality system.

Judge Pullan questioned whether the committee note promoted video testimony over live testimony by quoting from Bustillo v. Hilliard. Mr. Shea said that the quote was intended as a response to the committee note from the federal rule which says that deposition testimony is preferable to video testimony The committee decided that the "inmate" referred to in the note should be more fully described as the "plaintiff in a civil rights action."

The committee discussed whether to adopt the phrasing from the federal rule: "for good cause in compelling circumstances," whether one or the other would be sufficient, and if so, which one. Some members thought that "good cause" should be a sufficient showing and that the phrase is well known in other circumstances. Others felt that "compelling circumstances" represented a higher standard and that it would be easier to relax the standard based on experience than to raise the standard. Ultimately, the committee favored "good cause."

The committee approved the rule as amended to be published for comment.

(4) POST-TRIAL MOTIONS. RULES 50, 52, 59 AND 60.

Mr. Carney had proposed amendments several months ago to make Rule 50 more similar to its federal counterpart, which was adopted in 1991. There are three substantive changes. The first is to rename the motion from "motion for a directed verdict" and "motion for judgment notwithstanding the verdict" to "motion for judgment as a matter of law." Mr. Carney said the two current motions are really the same motion made at different times in the proceedings. He said the motion for a directed verdict described the former practice of directing the jury to enter a particular verdict, but that judges no longer take that approach. The new name for the motion is a more accurate description of the relief being requested and the grounds for that relief. The new name will not change the standards for considering the motion.

The second substantive change is to eliminate the requirement that a motion for a directed verdict be renewed at the close of all evidence. Under the federal rule and the proposed state rule, the motion must be made at the close of the other party's case and can be renewed, but it is not required. This eliminates a potential trap and still allows a party to correct an omission if the judge permits.

Finally, the federal rule was amended in 2009 to allow a more realistic 28 days after the judgment in which to make the motion. The current state rule is 14 days.

The remaining changes are to model the plain-language edits of the federal rules.

Mr. Carney recommends that all of the rules, like the federal rules, allow 28 days after judgment in which to file the motions, and he recommends that all of the rules, like the federal rules, calculate timeliness from the date the motion is filed. Currently the rules are a mix of when the motion was "filed" or "served" or "made."

Mr. Shea explained the further amendments he is proposing to Rule 52, Rule 59 and Rule 60.

Ms. McIntosh said that Rule 6 may also need to be amended to correct references to particular paragraphs within these rules.

The committee discussed the rules and will return to them at the next meeting.

(5) RULE 63. DISABILITY OR DISQUALIFICATION OF A JUDGE.

Mr. Shea reported that there had been three requests for changes to Rule 63. One would describe the required practice that the subject judge either grant the motion or transfer it to a reviewing judge for consideration without further response from the parties and without hearings. The second request would permit a second or subsequent motion if the motion was based on grounds not in existence at the time of the earlier motion. The third would incorporate the grounds for disqualification described in a federal statute.

The committee discussed the rule and will return to it at the next meeting.

(6) RULE 73. ATTORNEY FEES.

Mr. Shea reported that Rule 73 is being considered by the joint workgroup formed with the appellate rules committee, and that these proposed amendments are premature. The committee tabled the rule until the report from the workgroup.

(7) ADJOURNMENT

The committee adjourned at 6:00.