UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Meeting Minutes – January 27, 2016

Present:	Jonathan Hafen, Lincoln Davies, Rod Andreason, Sammi Anderson, Terri McIntosh, Trystan Smith, Paul Stancil, James Hunnicutt, Amber Mettler, Kent Holmberg, Steve Marsden
Telephone:	Lori Woffinden, Judge Pullan, Judge Furse, Judge Anderson
Staff:	Timothy M. Shea, Heather M. Sneddon, Nancy Sylvester
Guests:	James H. Deans, Kirk Cullimore, Jr., Martin Blaustein, Hollee Petersen, Jacob Kent, Lane Gleave
Not Present:	Judge Toomey, Barbara Townsend, Judge Blanch, Leslie Slaugh, Judge Baxter, Scott Bell, David Scofield

I. Welcome and approval of minutes. [Tab 1] – Jon Hafen

Jonathan Hafen welcomed the committee and invited a motion to approve the December meeting minutes. Rod Andreason identified one correction: changing Judge Shea to Tim Shea. Mr. Andreason moved to approve the meeting minutes with the proposed correction. Kent Holmberg seconded the motion and it carried unanimously.

II. Rule 26.3, Disclosure in Unlawful Detainer Actions; and Rule 9 alternative. [Tab 2] – Tim Shea

Tim Shea addressed Rule 26.3. The amendments are designed to describe the required disclosures in residential forcible entry/unlawful detainer actions. At the last meeting, Mr. Shea was asked to draft a Rule 9 option that would describe what is required for the complaint, and to draft a Rule 26.3 option that would describe the records/documents to be disclosed. Mr. Shea drafted both, but recommends the Rule 26.3 approach so that the information comes in the form of a disclosure rather than in the complaint. He believes that approach offers more flexibility and that the existing rules regarding the nature and consequences of disclosures will attach, whereas they might not attach to the complaint. A much broader issue exists regarding the statutory provisions for a forcible entry/unlawful detainer complaint, and whether the state legislature had the authority to do what it has done. For that reason, he recommended that the committee stay away from the complaint.

Mr. Shea tried to memorialize in Rule 26.3 the conclusions the committee reached at the last meeting. Accordingly, the required disclosures are built around the complaint and summons on the plaintiff side. Further disclosures are required if there is an occupancy hearing. The defendant's disclosures are built around the answer, and then the hearing. The party who requests the occupancy hearing will make disclosures first, and then the responding party will make their disclosures before the hearing. Mr. Shea raised a further question about paragraph (d) and whether counter-designations of deposition testimony and objections are relevant in eviction proceedings. If not, there is no need for that paragraph.

With respect to Rule 9 and the committee's request that a mark-up be proposed, Mr. Shea prepared new paragraph (n) on page 20. It did not include nearly as much detail as Rule 26.3, but he said the committee could still describe the disclosures in Rule 26.3. In response to Kent Holmberg's question, Mr. Shea confirmed that he does *not* recommend the committee change Rule 9. By way of explanation, Mr. Shea said that the Utah Supreme Court is over the Utah Rules of Civil Procedure. The legislature may amend a rule of procedure only by joint resolution with a 2/3 majority of both houses. Although it has been around a long time, the forcible entry/unlawful detainer statute was not adopted through that process and it is clearly procedural. If the Utah Rules of Civil Procedure describe what must be pleaded in addition to what is required in the statute, Mr. Shea believes it will raise an issue regarding the balance of authority between the legislature and the Supreme Court. He suggested that the committee stay well away from that. In addition, the mechanism for passing information from one party to another has always been through disclosures and discovery requests. He believes that is the more appropriate vehicle.

Discussion:

- Mr. Hafen asked whether anyone advocated for the Rule 9 option. Amber Mettler responded that there is an even more practical reason to avoid an amendment to Rule 9—if the required disclosures are accomplished only through Rule 9, the only way to bring the issue before the Court would be to file a motion to dismiss. If the disclosures are accomplished through Rule 26, the issue can be more easily brought before the judge at the hearing. Mr. Andreason commented that the argument in favor of a Rule 9 change last time was that Rule 11 would apply. Mr. Shea noted that disclosures also have Rule 11 consequences, and Ms. Mettler directed the committee to Rule 26(e) on that issue.

- Mr. Hafen requested comments on Mr. Shea's proposed Rule 26.3 language. Mr. Shea relayed Leslie Slaugh's emailed comments, which included a suggestion that "when the tenant is not a commercial tenant" in lines 3-4 apply only to forcible entry/unlawful detainer actions. Judge Pullan questioned whether lines 44-45 were necessary, given the language of Rule 26(a)(5)(B). Mr. Shea said he believed lines 42-45 could be eliminated. Ms. Mettler commented that objections to the admissibility of exhibits are also covered, but she was not sure if those were really made in these cases. Mr. Holmberg noted that one of the committee's guests previously advised that 3 out of 100 cases go to trial. Fourteen days is not workable because it is the same as initial disclosures. The regular rule is 28 and 14 days, so perhaps this rule should be 14 days for designations and 7 for counter-designations and objections. Mr. Andreason asked whether the occupancy hearing and trial are separate events. Mr. Shea responded that technically they are separate, but that the trial can be subsumed in the occupancy hearing.

- James Deans commented that at the occupancy hearing, most judges bifurcate and do not turn the hearing into the trial. Only the issue of possession is decided at the hearing. He hasn't seen a judge in many years conduct a trial at the occupancy hearing. Mr. Hafen commented that another guest had said the occupancy hearing was the critical piece. Mr. Deans responded that if possession is granted to the landlord, oftentimes the landlords decide they are done and they move on. Martin Blaustein said that in other parts of the state, some judges will hold evidentiary hearings at the possession level if they think they can resolve all of the issues. There are occasions where judges will hear the entire case at that stage. Kirk Cullimore, Jr. said last year his office filed between 2,000 and 3,000

evictions. They had perhaps 10 that went to trial within the expedited time frame under the statute.

- Based upon the comments of the guests, Mr. Shea said the final lines of paragraph (d) appear to still be relevant, even if invoked rarely. The main issue is timing; if pretrial disclosures are required 14 days before trial, perhaps counter designations should be provided 7 days before. Mr. Cullimore said that was probably appropriate, but practically speaking, once a trial date is set, typically the parties stipulate right then on when disclosures will happen based on the trial date and the judge's calendar.

- Mr. Cullimore asked what was meant by "itemization of rent past due," and what it accomplishes. He believes the amount is included in the 3-day notice. Steve Marsden asked if there was a practical problem where landlords frequently could not come up with an itemized calculation. Mr. Cullimore explained that they receive ledgers from landlords, but oftentimes they are not easily understood. Messrs. Andreason and Hafen noted that "itemization" was a compromise instead of requiring a ledger. Mr. Shea further noted that an itemization is important because certain types of damages can be trebled.

- Another guest questioned whether the changes to Rule 26.3 will have the opposite effect of protecting tenants. He believes that tenants won't provide the required disclosures. Mr. Shea responded that the committee shouldn't decide what to do based on what tenants have done in the past when they were not given sufficient information. With more information, tenants can make more informed decisions. He thinks the disclosures will be helpful.

- Judge Pullan commented that an itemization is important for the reasons discussed at the last meeting. He also questioned whether anything is gained by requiring an explanation for the factual basis for the eviction. Even with notice pleading, aren't we getting that already? It might have some value in cases alleging a crime or nuisance, but in most cases, he wonders whether we are gaining much. Mr. Shea said that he was trying to put the thoughts voiced at the last hearing into the rule.

- Mr. Andreason expressed his concern regarding paragraph (c)(1) and the requirement for two sets of disclosures by tenants. Mr. Blaustein said that he anticipated the tenant's answer would include the basis for the defense.

- Mr. Cullimore expressed his concern regarding Rule 26.3(b)(1) given the high percentage of defaults in these cases. An itemized calculation could be different than the ledger. Judge Pullan clarified that the rule does not require a ledger, and asked why a landlord would be pleading something different than what was disclosed. By way of example, Mr. Cullimore explained that a 3-day notice may have been served on Jan. 5th, but the case was not turned over to him for filing until Jan. 20th and now there are additional charges. The complaint alleges the rent owing through the date of the complaint. Mr. Hafen asked whether the concern would be alleviated if "known" was changed to "sought" in paragraph (b)(1)(C). Mr. Cullimore said that would be in the complaint. He asked whether the committee could word the rule in a way that said if the information was not in the complaint, then it must be in a separate disclosure. Messrs. Shea and Hafen said that if the landlord already knows the amount, it shouldn't be difficult to provide. Mr. Holmberg asked if you could call a complaint a disclosure. Mr. Blaustein commented that there is a lot of Supreme Court authority that

what gives rise to a complaint is the 3-day notice. You can't add issues to the complaint that are not reflected in the notice without getting an objection. The tenant should have an opportunity to challenge specific allegations, and if the tenant knows what is going on, the tenant is more likely to show up if there is something to challenge.

- Summarizing the committee's comments, Mr. Hafen proposed moving the commercial tenant language in paragraph (a) to after the unlawful detainer statute, changing "known" to "sought" on line 11, changing 14 to 7 in line 42, and removing (c)(1). Terri McIntosh raised line 13 concerning the factual basis for the eviction. From prior meetings, the committee has expressed concerns about the complaint including specific information about crimes due to the harm that may cause tenants. She suggested that we be more specific regarding what we want the landlord to disclose. Mr. Shea commented that the statute requires the plaintiff to set forth the facts upon which he/she seeks to recover. Ms. McIntosh asked whether the intention is to have the complaint say that crimes have been committed, and then to have the disclosure be more specific. Sammi Anderson asked whether we need to deal with the disclosure of documents, including police reports. Mr. Hafen suggested adding something like "unless otherwise provided in the complaint" to avoid the duplication issue. James Hunnicutt agreed with that proposal. Judge Pullan said that in failure to pay rent cases, tenants basically have what they need in the complaint. In other cases, like nuisance and crime cases, he thinks we should have a more detailed statement. Mr. Shea agreed with the proposal that the factual basis for the eviction should be provided in a disclosure unless included in the complaint. Mr. Andreason said that he likes the encouragement to include the information in the complaint.

- Judge Furse expressed her concern that the case law does not require much to be disclosed in the complaint; alleging a lease violation would be sufficient. She is concerned that plaintiffs will believe they have stated enough with that kind of allegation. Mr. Hafen clarified that we would simply be giving plaintiffs an option to include the required information in a complaint. If it isn't there, the plaintiff must serve all of the disclosures in the rule. He asked whether the "unless provided in the complaint" language should be added to line 7 or 13. Mr. Andreason said that putting it in line 7 avoids other redundancies. Mr. Hunnicutt agreed.

- With respect to the suggested change of "known" to "sought" in line 11, Ms. Mettler said that she assumed it would not prevent the accrual of attorneys' fees. Mr. Shea said that was not the intent. Mr. Hunnicutt proposed removing the word "known," which would solve the ambiguity. Mr. Hafen agreed. Judge Furse said that she preferred "known" over "sought," and would keep "known" in the rule.

- Ms. Anderson moved to remove the word "known" from line 11, to approve Mr. Slaugh's proposal regarding the "commercial tenant" clause in paragraph (a), and to add "unless provided in the complaint" to line 7. Mr. Marsden seconded and the motion carried.

- Mr. Marsden moved to strike (c)(1) from the rule, which Messrs. Andreason and Hunnicutt seconded. All approved the motion except Judge Pullan, who dissented. He said the rule is well drafted the way it is, he doesn't believe it is a trap, and he thinks it creates predictability for what a tenant is obligated to do. Ms. Mettler proposed that the committee adopt similar language to line 7; i.e., unless the information is included in the answer, the defendant must serve a disclosure with the explanation. Ms. Anderson expressed her

approval, as it would make the rule symmetrical. Mr. Andreason said that the default rate is so high that to get any response is great. In his view, requiring tenants to do more by providing a more thorough factual basis for their defense seems like too much. Mr. Hafen commented that we're dealing with the 10% of tenants who are going to file an answer, and with respect to them, we want to lay out a simple road map for what they have to do. Mr. Marsden questioned whether a denial of everything in the complaint is a sufficient factual basis under the rule. Mr. Hunnicutt asked whether a tenant may defend him or herself at the hearing if they don't do the disclosure. Mr. Andreason said that we're lucky to get 10% of tenants to respond, and asked whether we want to add to their burden.

- Several guests provided comments about occupancy hearings, and whether judges would allow tenants to present evidence if they had not provided disclosures. Mr. Marsden commented that (c)(1) merely requires an explanation of the tenant's defense; landlords will not receive emails or a list of witnesses, they will receive a 2-line narrative at best. He expressed his view that it was a trap for pro se tenants on a technical requirement that gives the landlord no practical information.

- Mr. Hafen noted that the committee had already voted to remove (c)(1) from the rule and asked whether anyone wanted to make a motion to put it back in. Ms. Mettler moved to include (c)(1) in the rule with her proposed modification. Judge Pullan seconded. The motion did not carry.

- Mr. Hafen asked whether there was a motion to alter lines 30-45 of Rule 26.3. Mr. Hunnicutt said that Rule 5 requires service within a week and in a prompt fashion, but delivery and receipt does not have to be guaranteed. He suggested that the committee address the issue of actual delivery, given the tightness of deadlines that are 2 days before the occupancy hearing. Mr. Holmberg suggested that service be accomplished by the method under which it will be most promptly received. Mr. Hunnicutt agreed. Although Rule 5 addresses the issue, he commented that pro se parties are unlikely to read Rule 5. The guests commented that most tenants show up at the hearing with their evidence rather than serve the landlord with it beforehand. Mr. Cullimore said that he doubted any judge would enforce the rule. Several committee members noted, however, that he would want the information even if it wasn't provided in every case, especially in cases where the tenant was represented. Mr. Hunnicutt moved to incorporate his proposed amendment that service be accomplished through the method most promptly to be received, and to make it symmetrical for the plaintiff. Ms. Anderson seconded. The motion carried.

- Mr. Hafen invited a motion concerning paragraph (d). Mr. Holmberg moved that the 14-day deadline be changed to 7 days. Mr. Hunnicutt seconded and the motion carried. Judge Pullan moved to strike lines 44 and 45, beginning with "other than." Mr. Marsden seconded. Mr. Shea noted those lines were already part of Rule 26. All voted in favor of the motion.

- Ms. Anderson moved to publish Rule 26.3 for comment as amended. The motion was seconded and all voted in favor.

III. Rule 4, Process. [Tab 3] – Tim Shea

Mr. Shea explained that there are two issues for the committee to address on Rule 4. First, we have been invited by the Supreme Court to consider what to do about lines 10-13, which allow a plaintiff to serve a second defendant right up to the date of trial if the first defendant was timely served. The subcommittee proposed the deletion of that provision.

Discussion:

- Although the federal rules are changing to 90 days, Mr. Hunnicutt proposed that the committee not make a similar change to line 6 of Rule 4 and to instead keep it at 120 days. He has spoken with other divorce lawyers, commissioners, and Mary Jane. They believe the change will negatively impact pro se and low income litigants in family law where each step of the process is an emotional obstacle. Mr. Andreason said that he is persuaded; it sounds like a distinct difference between the state and federal systems. Mr. Hafen commented that one of our committee's pillars is that we should try to achieve symmetry with the federal rules when possible, but if there is a good reason to deviate, we should deviate. Judge Pullan said that in cases where service is difficult, he thinks it is unlikely that service will be accomplished in 120 days if it isn't accomplished in 90 days. He doesn't believe the courts will be inundated with motions to extend the time for service if the change is made to 90 days. Mr. Hunnicutt responded that he didn't think the floodgates would open, but that there would be a definite uptick in motions, which would mean more work for divorce lawyers and commissioners. Lori Woffinden said that from a clerical standpoint, the court's CORIS system has a method to send out notice in 120 days. She knows that it can be changed, but there won't be any changes to CORIS until it is rewritten in 2-4 years. Nancy Sylvester said that she believes that is incorrect; if it needs to be done it simply must be prioritized. Ms. Woffinden said that in the past, this issue was at the bottom of the priority list. Judge Pullan said that Ms. Woffinden had a good point. He has had grave difficulty getting any priority with IT. Paul Stancil said that he was leaning toward Mr. Hunnicutt's proposal of 120 days. He is not sure there is a magic number, but he is persuaded that we don't have to follow the federal rule simply to follow it. There are different considerations, and the state dockets should be driving our decision. Mr. Hunnicutt moved to leave the timeframe at 120 days. Mr. Stancil seconded. The motion carried.

The second issue on Rule 4 concerns acceptance of service. Mr. Shea said that the committee previously asked him to prepare something regarding acceptance of service, so he prepared paragraph (d). Acceptance and waiver of service are based on the same concept, so Mr. Shea proposed that they be deleted and that service by mail be adopted instead. If we have acceptance of service, there would be a process whereby the defendant would complete a form, send it to the plaintiff, and the plaintiff would file it with the court. In that instance, the court would have some assurance that the defendant is aware of lawsuit. The software application that Lane Gleave has developed would certainly qualify. The language in paragraph (d) is platform independent, as long as the court eventually ends up with the receipt or acknowledgement. Other methods would work, including first class mail, so long as a receipt comes back. Other amendments to the rule address the style and grammar changes that the committee has been trying to identify as it proceeds through rule changes. Mr. Hafen invited comments from the committee.

Discussion:

- Mr. Gleave said that perhaps he does not understand the proposal, but he believes deleting the option of permitting service by mail is limiting. He is not sure that we want to remove that option for service. Mr. Shea said that an acceptance of service can be delivered by mail, but that in some senses, the option to serve by mail would be eliminated. He did not perceive any purpose in serving by mail or commercial courier service if the acceptance provisions are adopted. Ms. Anderson asked whether those methods of service are conceptually distinct, and what happens if a defendant doesn't accept service. Mr. Gleave said that in many instances, he attempts service when a defendant is not home and the distance traveled is quite far for a second or third attempt. Sometimes those defendants opt to receive a certified copy instead. Mr. Shea said that paragraph (d) simply reflected his perception, and that perhaps (d)(2) should be reinstated. Ms. Anderson said we're talking about 2 different things. One is a method of service available to a plaintiff, and one is a method of acceptance available to a defendant. She believes we should have both, and moved to reinstate (d)(2) (on page 26). Mr. Andreason seconded. All voted in favor of the motion.

- Judge Pullan raised the language in (d)(4) reflected on page 24, lines 59-63, which updates lines 201-202 on page 28. Trystan Smith said that, from his perspective, (d)(4) is problematic for defendants. Many times you can't find your client to get authority to accept service. Mr. Shea commented on the federal rule equivalent, and explained that (d)(4) is in essence an edited copy and paste from the federal rule. Mr. Hafen asked whether a change of "person" to "defendant" would resolve the issue. Mr. Smith said that it would not. There could be an innocent reason for the inability to accept service, but the defendant is still left to fight over good cause. Ms. Mettler said that she has clients who may not be able to give permission to accept service within the time required. Ms. Anderson commented that the rule seems geared toward those who are difficult to serve; most business entities have registered agents who are easy to serve.

- Mr. Hafen asked whether Mr. Smith had similar concerns regarding existing paragraph (f). Mr. Andreason noted that the difference is attorneys' fees. Mr. Hafen said that the existing paragraph also does not include a good cause element. Judge Pullan said he objected to the concept. If he is sued on an unmeritorious claim, and he refuses to accept service and then he wins and is entitled to his costs, the rule would seem to require him to then pay the plaintiff for the costs and fees associated with service. Mr. Hafen asked whether conceptually the committee was fine with leaving the old paragraph (f) in, but not including lines 59-63 in (d)(4). Messrs. Smith and Hunnicutt agreed. Judge Pullan commented that he doesn't like the fact that if he didn't play nice and has to defend an unmeritorious claim, he might still have to pay for service. It isn't good policy. Mr. Stancil said that conceptually, he understands that acceptance is designed to think about a new method of service, i.e., electronic. He sees that as conceptually different from waiver. Lines 59-63 are talking about the stick to encourage someone to agree to service via email. It is a pretty big stick, however, with attorneys' fees included. Mr. Andreason said that he hopes the majority of cases are not bogus, and that the reason the rule is set up this way is so that plaintiffs have a stick for putative defendants who are trying to evade service. Mr. Shea commented that if the plaintiff prevails, service costs are recoverable. Under (d)(4), you don't have to prevail to recover.

- Mr. Hafen asked whether anyone is in favor of leaving in the second sentence of (d)(4), i.e., lines 60-63. Ms. Anderson moved to strike those lines. Ms. Mettler seconded. The motion carried.

IV. Rule 35, Physical and mental examination of persons.

Mr. Smith explained that he had sent an email regarding the minutes for the January 2011 advisory committee meeting that addressed Rule 26 experts and how they relate to Rule 35(b). To steer the committee's discussion of Rule 35 at the next meeting, he encouraged the committee to review those minutes, as well as the minutes from the August 2011 meeting, to see the committee's prior discussion of Rule 35.

The meeting adjourned at 5:59 pm. The next meeting will be held on February 24, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.