

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE**

Meeting Minutes – October 26, 2016

PRESENT: Jonathan Hafen, Trystan Smith, James Hunnicutt, Judge James Blanch, Judge Kate Toomey, Terri McIntosh, Lincoln Davies, Judge Andrew Stone, Leslie Slaugh, Rod Andreason, Barbara Townsend

ABSENT: Dawn Hautamaki, Judge John Baxter, Judge Derek Pullan, Sammi Anderson, Heather Sneddon, Amber Mettler, Kent Holmberg

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: Zachary Myers, Ken McCabe, Martin Blaustein, Jacob Kent, Kirk Cullimore, Jr., Jeremy Shorts, Jim Deans, Alan Robbins, Jason Jacobson, Rick Schwermer, Kyle Johnson

(1) WELCOME

Chair Jonathan Hafen welcomed the committee and guests.

(2) RULE 4. PROCESS (SERVICE UPON ROOMMATES).

Leslie Slaugh began with a summary of the issue to be discussed.

Zachary Myers spoke on behalf of tenants in support of Mr. Slaugh's proposed rule changes. Mr. Slaugh raised the issue of serving a husband and wife, particularly the issue of requiring service upon both and the issue of one avoiding service after notice to the other. Martin Blaustein responded that typically both husband and wife appear at the hearing if one has been requested, and, as a result, an order of judgment can be obtained against both of them.

Kirk Cullimore spoke on behalf of landlords, suggesting change isn't necessary, i.e. the rule is not currently broken. Mr. Cullimore argued there are already safeguards in place to notify the parties, including the termination notice that precedes the unlawful detainer action. Mr. Slaugh suggested that although we do not typically make rules for a small minority of situations or individuals, sometimes we do if there is a need to protect them. Jeremy Shorts spoke about complicating the service process. Guests from a process server company represented that in about 90% of unlawful detainer actions, the papers are served on a named party. They explained the limitations of process servers not being able to force parties to identify themselves and said avoidance of service has become an increasing problem as parties are more frequently seeking loopholes in the system. Judge Blanch clarified when treble damages begin to accrue. Terri McIntosh questioned how often treble damages are actually collected. Attorneys speaking on behalf of landlords suggested the proposal would further burden the courts with increased motion practice. Mr. Cullimore noted that

the intent of the Legislature was to expedite the process and that the rule as it currently exists was created with Rule 4 in its current state.

Attorneys speaking on behalf of tenants represented that they get calls approximately once a week claiming the party never received notice of and had no knowledge of the action. Each side discussed how unlawful detainer actions happen in other states. It was further noted that service of the action is jurisdictional. Attorneys speaking on behalf of landlords suggested that the proposed change puts additional burden on process servers. Judge Blanch asked Judge Toomey how often this issue came before her as a judge, and she indicated that many instances of it happening stuck out in her mind. Attorneys speaking on behalf of tenants raised fairness issues.

The Committee discussed the proposed change. Mr. Hafen proposed that discussion of this issue be shelved and no action on the proposed change be taken. Although it appeared that this issue has come up in a handful of cases, he was not convinced that it was big enough to merit a change to the rule. The committee agreed.

(3) APPROVAL OF THE MINUTES.

Judge Toomey moved to approve the minutes from the September 28, 2016 meeting, as amended; James Hunnicutt seconded. The motion approved unanimously.

(4) RULE 15. FURTHER AMENDMENT REQUESTED BY THE UTAH SUPREME COURT (COMMITTEE NOTE).

Mr. Hafen presented the proposal from the Utah Supreme Court regarding proposed Rule 15, line 39, and the added Advisory Committee Note. The committee discussed the proposed committee note and agreed on the following language: “Although the precise language is different for purposes of clarity, the 2016 amendments to the Utah Rule of Civil Procedure 15(c) adopt the approach of Federal Rule 15(c) regarding the relation-back of an amended pleading when the amended pleading adds a new party.”

Lincoln Davies moved to adopt the proposed change to Rule 15(c) with the agreed-upon Advisory Committee note; Barbara Townsend seconded. The motion passed unanimously.

(5) RULES 34 AND 35: COMMENTS.

Mr. Hafen presented on the comments to Rule 34 and the suggested edits in response to the same, including Nancy Sylvester’s suggested edit in response to a comment from Clark Fetzer. In addition to Ms. Sylvester’s suggested edit, Mr. Slauch suggested we add language to proposed Rule 34, line 28 to add the following italicized language: “The party must identify and permit inspection of *items responsive to* any part of a request that is not objectionable.” The committee discussed the suggested edits and was in favor of both.

Ms. Townsend moved to send amended Rule 34 with Ms. Sylvester’s and Mr. Slauch’s suggested edits to Utah Supreme Court for approval; Judge Toomey seconded. The motion passed unanimously.

Ms. Sylvester presented on the comments to proposed Rule 35. The committee discussed the comments on 28 days versus 60 days for the examiner to produce a report and a proposal for including language permitting an extension to the allotted period to produce a report. Trystan Smith noted that as a practical matter parties were typically only producing a single, combined report under Rules 26 and 35, rather than two separate reports. The committee was generally of the opinion that if current practice was to produce one report instead of two, that the rule should not be amended to encourage two reports.

The committee discussed at length the interplay between the proposed deadline and the close of fact discovery and expert disclosure deadlines. Some concern was expressed about a likely need to extend fact discovery (and need to file serial stipulations for extraordinary discovery to do so) in order to meet deadlines if the Rule 35 report would need to be disclosed significantly before the close of fact discovery. Mr. Smith proposed setting the deadline at the shorter of 60 days after the examination or seven days prior to the close of fact discovery. The final proposal was to change line 12 of proposed Rule 35 to “examiner within the shorter of 60 days after the examination or 7 days prior to the close of fact discovery, setting out the examiner’s findings.” The committee discussed whether the new proposal should go back for public comment, and decided that additional public comment was advisable. Mr. Smith also suggested adding language to the proposed Rule 35 itself to note that two separate reports are not required. The proposal was to add language to line 16 of the proposed Rule 35 to read: “as required by Rule 26(a)(4), but need not provide a separate Rule 26(a)(4) report if the report under this rule contains all the information required by Rule 26(a)(4).” The committee also discussed whether an amendment to the Advisory Committee note was appropriate in light of the foregoing proposed amendments, and requested that Ms. Sylvester make a minor edit to it.

Mr. Hunnicutt moved to adopt the preceding amendments and send them out for public comment; Rod Andreason seconded. The motion passed unanimously.

(6) TIER 2 VERSUS TIER 3 AND LIMITS ON VERDICTS.

Mr. Hafen presented on a recent decision from Judge Kara Pettit where a plaintiff pleaded his case as Tier 2, received a verdict in excess of the Tier 2 limits, and moved to amend the complaint to conform to the evidence following the verdict to make it a Tier 3 case. Judge Pettit followed the committee’s FAQ anticipating this situation and denied the motion.

Judge Stone recommended discussing a possible change to have the tier designations include only certain categories of damages. Mr. Hafen suggested the committee discuss that proposal at a later date and in conjunction with input from the Tier 3 pilot program.

(7) ADJOURNMENT.

The remaining matters were deferred, and the committee adjourned at 6:04pm. The next meeting will be held on November 16, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.