

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

Meeting Minutes – January 25, 2017

PRESENT: Jonathan Hafen, Judge Andrew Stone, Paul Stancil, Amber Mettler, Rod Andreason, Leslie Slaugh, Terri McIntosh, Kent Holmberg, Trystan Smith, Barbara Townsend, Heather Sneddon, Sammi Anderson

TELEPHONE: Dawn Hautamaki, Judge Derek Pullan

ABSENT: Judge James Blanch, Judge Kate Toomey, Lincoln Davies, Romaine Marshall, James Hunnicutt, Judge John Baxter

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: None

(1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee. Nancy Sylvester presented the meeting minutes from the November 16, 2016 meeting. Proposed changes to the minutes were discussed. Rod Andreason moved to approve those minutes, as amended; Terri McIntosh seconded. The motion was approved unanimously.

(2) COMMENTS TO RULES 7, 65C, 35

Ms. Sylvester reviewed comments to Rule 7 and the committee discussed them. In response to a comment from Judge Samuel McVey, the following Advisory Committee note was proposed and approved: “Rule 7(q) is directed only at limitations on order to show cause hearings initiated by parties. Nothing in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause hearings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court’s docket.” There were no comments on Rule 65C. Leslie Slaugh moved to send amended Rules 7 (with the aforementioned Advisory Committee note) and 65C to the Utah Supreme Court; Trystan Smith seconded the motion. With no further discussion, the motion was approved unanimously.

The committee then discussed the comments to Rule 35 at length, and ultimately determined that no further changes to Rule 35 were warranted. Judge Andrew Stone moved to send amended Rule 35 to the Utah Supreme Court for approval; Barbara Townsend seconded. The committee unanimously approved the motion.

(3) FRCP RULE 37(e); FAILURE TO PRESERVE ESI

Paul Stancil began the discussion on Rule 37(e) by presenting a summary of the key differences between Judge Stone's position and Judge Derek Pullan's position regarding proposed changes to Rule 37(e).

Judge Stone presented his position first. He said he is concerned that the stated bases for treating electronic discovery differently from paper discovery are no longer present in light of advances in technology. He thinks it is too high of a burden to require a party to prove intentional destruction before a permissive adverse inference may be given. He noted that it is unclear what burden would be required for such a showing and that the rule is only implicated after the duty to preserve has been triggered. Judge Stone also disagreed with the premise that a permissive adverse instruction is always a "death penalty" sanction, and instead is confident that it is possible to give a neutral permissive adverse inference. Judge Stone said he is also concerned that the proposed rule may permit gamesmanship by restricting the judge's ability to sanction parties for misconduct. Judge Stone walked the committee through his recommendation, which, first and foremost, was no amendment to the rule, but then potentially an alternative amendment.

Next, Judge Pullan presented his position. Judge Pullan's primary goal in advocating for the federal language was that juries would decide cases on the evidence before them, not on adverse instructions or missing evidence. Judge Pullan's focus is on the neutrality from the bench toward juries when it comes to missing evidence. He did not think the judge should be putting his or her thumb on the scale regarding missing documents' contents. Judge Pullan isn't concerned about gamesmanship, because he thinks gamesmanship can be determined to be evidence of intentional destruction. Judge Pullan's proposal is to amend Rule 37 as previously suggested, which is largely consistent with the recently amended federal rule. Judge Pullan noted the benefit of consistency with the federal rule in that a robust body of case law will quickly develop in federal courts which will assist in interpreting the rule. As an alternative, Judge Pullan agrees with removing the limitation on permissive adverse inferences, as proposed by Judge Stone.

Professor Stancil noted that errors are inevitable, and that no rule will eliminate the possibility of errors. He also noted that it is a natural human tendency to presume that missing documents are the result of a nefarious plot, and that anything that tips the scale further in that direction is dangerous.

Kent Holmberg noted that electronic discovery is more than just emails, which are easily stored, but also includes voicemails, text messages, telephone calls, browsing history, etc. He said without an amendment to the rule, entities may reasonably determine that in response to every notice of claim or preservation letter, it is necessary to gather up all employee cell phones to gather potentially responsive documents, incurring a significant expense.

Mr. Slauch stated his preference for uniformity with the federal rule. Judge Stone noted that this committee has been a leader in the past, amending Rule 26 with a shift towards proportionality, and that it should do so again, because it is better to be right than uniform. Mr. Smith discussed the burden of proof under both proposals. Judge Pullan noted his agreement with Judge Stone regarding the importance of being right over being uniform. Judge Pullan also raised the "intent to deprive" standard and the varying degrees of intent under criminal law and proposed a modification of intent

to include conduct committed “knowingly.” Judge Stone responded that the proposal did not assuage his concerns about removing the judge’s ability to give a permissive instruction. The committee also discussed what preliminary findings would be necessary regarding the initial existence of a specific missing document versus the general existence of a category of missing documents. The committee also discussed the distinction and nuances between “may presume” and “must presume,” i.e. a mandatory versus permissive rebuttable presumption, and how that works in practice.

Ultimately, the committee decided to defer a decision on the proposals to the next meeting.

(4) ADJOURNMENT

The remaining matters were deferred, and the Committee adjourned at 6:04pm. The next meeting will be held on February 22, 2017 at 4:00pm at the Administrative Office of the Courts, Level 3.