

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

**Meeting Minutes – February 22, 2017**

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**PRESENT:** Chair Jonathan Hafen, Judge Andrew Stone, Judge James Blanch, Judge Kate Toomey, Judge Kent Holmberg, Lincoln Davies, Paul Stancil, Rod Andreason, Leslie Slauch, Terri McIntosh, Trystan Smith, Heather Sneddon, James Hunnicutt

**TELEPHONE:** Judge Derek Pullan (guest)

**EXCUSED:** Judge John Baxter, Amber Mettler, Sammi Anderson, Barbara Townsend, Dawn Hautamaki

**STAFF:** Nancy Sylvester, Lauren Hosler

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**(1) WELCOME, APPROVAL OF MINUTES**

Chair Jonathan Hafen welcomed the committee. Mr. Hafen proposed cancelling the June meeting. There was a consensus of approval among the committee. Rod Andreason moved to approve the minutes as drafted; Leslie Slauch seconded. The motion was approved unanimously, with one abstention (Judge Kate Toomey, due to her absence at the prior meeting).

Mr. Hafen congratulated Kent Holmberg on his recent appointment as a Third District judge. Mr. Hafen then informed the committee of two resignations: Judge Derek Pullan, due to another assignment, and Romaine Marshall, due to his lack of availability. Mr. Hafen announced that the Utah Supreme Court appointed Judge Laura Scott and Justin Toth to fill the vacancies.

**(2) COMMENTS TO RULES 5, 45, AND 84**

The committee then reviewed comments to Rule 5. The committee discussed moving the proposed amendment to Rule 6 (from its proposed location in Rule 5), and creating a new subsection (6)(d). The committee also discussed whether the rule should state “filed” or “served,” or both. The committee reached a consensus on the following language to be added to Rule 6:

**(d) Filing or service by inmate.**

(d)(1) Papers filed or served by an inmate confined in an institution are timely filed or served if they are deposited in the institution’s internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, and that the inmate has complied with any applicable requirements for legal mail set by the institution.

Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail, plus any time added under paragraph (b).

(d)(2) The provisions of paragraph (d)(1) do not apply to service of process, which is governed by [Rule 4](#).

Judge Andrew Stone moved to adopt foregoing proposal and to submit it to the Utah Supreme Court for approval, pending approval of the proposed changes by the Rules of Appellate Procedure Committee. Judge James Blanch seconded the motion. The committee approved it unanimously.

Rules 45 and 84 had no public comments, but the review of the comments to Rule 5 (now Rule 6) raised concerns about Rule 45. Based on that discussion, the committee proposed the following change to Rule 45:

**(i) Procedure when witness is ~~confined in jail~~ an inmate.** If the witness is an ~~prisoner inmate confined in an institution~~, a party may move for an order to examine the witness ~~in the institution in the jail or prison~~ or to produce the witness before the court or officer for the purpose of being orally examined.

Judge Blanch moved to adopt the change and to submit it to the Utah Supreme Court for approval. Jim Hunnicutt seconded the motion, which the committee unanimously approved.

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

The committee picked up the discussion of proposed changes to Rule 37, which was a continuation of prior meetings' discussions. Paul Stancil began with a short summary and input from his recent conversation with Chief Judge Lee Rosenthal of the Southern District of Texas, who was involved in the amendments to the corresponding federal rule. Mr. Stancil also reported on cases from federal district courts interpreting the recent amendments to the FRCP 37(e).

Judge Stone presented his suggested Advisory Committee Note, to be added to the existing proposed note:

Subsection (e) concerns sanctions available for the destruction of electronically stored information and is limited to such sanctions. It does not limit the Court's ability to sanction in other circumstances (see e.g., 37(b)(7)), and does not bar (1) the parties from litigating the issue of the loss or destruction of electronically stored information before the finder of fact, (2) the finder of fact making whatever inferences it deems appropriate from the totality of the evidence, or (3) the court from giving general instructions regarding permissible inferences from a failure to produce evidence formerly in a party's possession.

There was general support for proposed change with Judge Stone's suggested note addition. Mr. Stancil made a motion to send the proposed amendment to Rule 37 with Judge Stone's proposed

addition to the Advisory Committee note out for public comment; Judge Toomey seconded. Further discussion ensued before a vote was taken.

Heather Sneddon raised the issue of the distinction between “presume” and “infer” in proposed Rule 37(e)(1)(B)(2). Trystan Smith raised the issue of Utah Rule of Evidence 301 in support of using the federal rule’s language. The committee discussed both issues.

Ultimately, the committee reached a consensus to send the proposed changes to Rule 37 (matching the recently amended federal rule verbatim) out for comment, with the addition of the following in the Advisory Committee note:

It is the opinion of the Advisory Committee that subsection (e) concerns sanctions available for the destruction of electronically stored information and is limited to such sanctions. It does not limit the Court’s ability to sanction in other circumstances (see e.g., Rule 37(b)(7)), and does not bar (1) the parties from litigating the issue of the loss or destruction of electronically stored information before the finder of fact, (2) the finder of fact making whatever inferences it deems appropriate from the totality of the evidence, or (3) the court from giving general instructions regarding permissible inferences from a failure to produce evidence formerly in a party’s possession.

Regarding missing evidence instructions, this note represents a departure from the approach articulated in the federal committee’s note.

Mr. Hunnicutt moved to send the above proposal out for comment. Ms. Sneddon seconded the motion. The committee approved it unanimously.

#### **(4) ADJOURNMENT**

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