

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

Meeting Minutes May 23, 2018

PRESENT: Chair Jonathan Hafen, Judge Kate Toomey, Susan Vogel, Katy Strand (Recording Secretary), Judge Andrew Stone, Heather Sneddon, Judge Laura Scott, Judge Kent Holmberg, Leslie Slaugh, Michael Petrogeorge, Judge James Blanch, Dawn Hautamaki, Lauren DiFrancesco, Jim Hunnicutt, Judge Amber Mettler, Judge Clay Stucki

EXCUSED: Rod Andreason, Barbara Townsend, Trystan Smith, Justin Toth, Lincoln Davies, Paul Stancil

GUESTS: Clayson Quigley, Patricia Owen

STAFF: Nancy Sylvester

(1) WELCOME, APPROVAL OF MINUTES.

Jonathan Hafen welcomed everyone to the meeting and requested a motion on the April minutes. Judge Toomey moved to approve the minutes, Judge Andrew Stone seconded, and the motion passed unanimously.

(2) UPDATE ON RULE 5, ORDERS SERVED BY THE COURT, NEW CJA RULE 4-511, MANDATORY EMAIL ADDRESS, AND RULE 10, CONFORMING AMENDMENTS.

Mr. Hafen and Nancy Sylvester introduced Rule 5 and Ms. Sylvester proposed that the committee hold off on these rules until the programming for MyCase is done. Clayson Quigley reported that MyCase will be a portal where parties can log in and gain access to all of the documents on their case. They will receive notifications and see scheduled hearings. In phase 2, much further down the road this will include e-filing. He also reported that MyCase will also be used for online dispute resolution (ODR). ODR will allow parties to discuss issues and attempt to resolve issues before filing cases. If parties are eligible for online dispute resolution, MyCase will inform them.

Mr. Quigley reported that MyCase will be available this summer, but only for small claims. It should be available for all cases by the end of the year.

Dawn Hautamaki reported that the clerks have discussed starting to gather email addresses so that they will be able to send out items to pro se litigants via email. The clerks would like this type of service to be automated.

Mr. Hafen asked what was stopping the rules from requiring email addresses from all litigants. Mr. Quigley responded that the collection of email addresses is currently a problem. Dawn Hautamaki

pointed out that often the courts do not get all the addresses, and email may be more problematic. Further, when filling out certificates of service, email does not auto-populate. Leslie Slaugh noted that once a litigant answers there should be an email under Rule 10. The email could then be put into the system. Judge Blanch stated that his clerks use email to send notice. But when a default is possible, Judge Blanch requires his clerks to also mail the notice.

Ms. Hautamaki said clerks won't email pro se litigants currently unless there is a consent to service by email on file. Mr. Slaugh said he saw no reason why service by email should not be presumptively valid. Judge Kate Toomey believed that parties must be able to opt out.

Ms. Sylvester proposed changing Rule 5(b)(3)(B) to say "emailing it to the most recent email address provided by the person pursuant to Rule 10(a)(3) or to the email address on file with the Utah State Bar." Ms. Sylvester argued that this would allow for an opt out, as they do not have to put an email address in the caption if they don't have one. Susan Vogel stated that putting an email in the caption does not let parties know that they may get served there. Mr. Slaugh argued this concern was too paternalistic; if they provide an email they should assume it will be used. Judge Blanch proposed that the form answer could include information telling them that the email will be used for service, but any changes to the forms should be decided by the forms committee.

Judge Holmberg expressed concern that parties could change email addresses and they would not be properly updated in the system. Judge Stucki proposed adding a reference to Rule 76 so that the updated address will be used.

The language in Rule 5(b)(3)(B) was changed to "emailing it to the most recent email address provided by the person pursuant to Rule 10(a)(3) or Rule 76, or to the email address on file with the Utah State Bar." The full language of the rule is as follows:

Rule 5. Service and filing of pleadings and other papers.

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

- (a)(1)(A) a judgment;
- (a)(1)(B) an order that states it must be served;
- (a)(1)(C) a pleading after the original complaint;
- (a)(1)(D) a paper relating to disclosure or discovery;
- (a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and
- (a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

- (a)(2)(A) a party in default must be served as ordered by the court;
- (a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);
- (a)(2)(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;
- (a)(2)(D) a party in default for any reason must be served with notice of entry of judgment under Rule [58A\(d\)](#); and
- (a)(2)(E) a party in default for any reason must be served under Rule [4](#) with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule [75](#) and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(b)(3)(B) emailing it to the most recent email address provided by the person pursuant to Rule [10\(a\)\(3\)](#) or Rule [76](#), or to the email address on file with the Utah State Bar, ~~if the person has agreed to accept service by email or has an electronic filing account;~~

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) every paper prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B) when service to all parties is made under paragraph (b)(3)(A).

(e) Filing. Except as provided in Rule [7\(j\)](#) and Rule [26\(f\)](#), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section [46-1-16\(7\)](#);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

Leslie Slauch moved to recommend the rule to the Supreme Court. Judge Toomey seconded. The motion passed unanimously.

(3) Rule 109. Automatic temporary domestic orders. New.

Ms. Sylvester reported that proposed Rule 109 was discussed by the Board of District Court Judges after the committee finalized its edits. Regarding the question of service versus notice of the Rule 109 injunction, the Board proposed that paragraph (d)(2) say the injunction is binding “on the respondent after filing of the initial petition and upon receipt of a signed copy of the injunction.” The Board felt this struck a middle ground between simple notice and Rule 4 service, both of which carried concerns. The Board also proposed removing the modifier “unduly” regarding involving children in the case. Judge Stone supported these changes. Lauren DiFrancesco expressed concerns about providing a signed order in each case, as each case would not have an assigned judge at the time of filing. Judge Stone stated that it would be a standing order signed by the presiding judge and a copy would be provided in each case.

Ms. Vogel questioned the use of the term “receipt.” Judge Scott stated that it requires the actual injunction to be provided, which avoids parties representing what was in the injunction, but does not require actual service, avoiding the possibility that a party could knowingly avoid service in order to violate the injunction. The rule was proposed as follows:

Rule 109. Automatic injunction in certain domestic relations cases.

(a) **Actions in which an automatic domestic injunction enters.** In an action for divorce, annulment, temporary separation, custody, parent time, support, or paternity, an injunction automatically enters when the initial petition is filed. The injunction contains the applicable provisions of this rule.

(b) **General provisions.**

(b)(1) If the action concerns the division of property then neither party may transfer, encumber, conceal, or dispose of any property of either party without the written consent of the other party or an order of the court, except in the usual course of business or to provide for the necessities of life.

(b)(2) Neither party may disturb the peace of the other party or harass, annoy, or bother the other party.

(b)(3) Neither party may commit domestic violence or abuse against the other party or a child.

(b)(4) Neither party may use the other party’s name, likeness, image, or identification to obtain credit, open an account for service, or obtain a service.

(b)(5) Neither party may cancel or interfere with telephone, utility, or other services used by the other party.

(b)(6) Neither party may cancel, modify, terminate, change the beneficiary, or allow to lapse for voluntary nonpayment of premiums, any policy of health insurance, homeowner's or renter's insurance, automobile insurance, or life insurance without the written consent of the other party or pursuant to further order of the court.

(c) **Provisions regarding a minor child.** The following provisions apply when a minor child is a subject of the petition.

(c)(1) Neither party may engage in non-routine travel with the child without the written consent of the other party or an order of the court unless the following information has been provided to the other party:

(c)(1)(A) an itinerary of travel dates and destinations;

(c)(1)(B) how to contact the child or traveling party; and

(c)(1)(C) the name and telephone number of an available third person who will know the child's location.

(c)(2) Neither party may do the following in the presence or hearing of the child:

(c)(2)(A) demean or disparage the other party;

(c)(2)(B) attempt to influence a child’s preference regarding custody or parent time; or

(c)(2)(C) say or do anything that would tend to diminish the love and affection of the child for the other party, or involve the child in the issues of the petition.

(c)(3) Neither party may make parent time arrangements through the child.

(c)(4) When the child is under the party's care, the party has a duty to use best efforts to prevent third parties from doing what the parties are prohibited from doing under this order or the party must remove the child from those third parties.

(d) **When the injunction is binding.** The injunction is binding

(d)(1) on the petitioner upon filing the initial petition; and

(d)(2) on the respondent after filing of the initial petition and upon receipt of a signed copy of the injunction.

(e) **When the injunction terminates.** The injunction remains in effect until the final decree is entered, the petition is dismissed, the parties otherwise agree in a writing signed by all parties, or further order of the court.

(f) **Modifying or dissolving the injunction.** A party may move to modify or dissolve the injunction.

(f)(1) Prior to a responsive pleading being filed, the court shall determine a motion to modify or dissolve the injunction as expeditiously as possible. The moving party must serve the nonmoving party at least 48 hours before a hearing.

(f)(2) After a responsive pleading is filed, a motion to modify or to dissolve the injunction is governed by Rule 7 or Rule 101, as applicable.

(g) **Separate conflicting order.** Any separate order governing the parties or their minor children will control over conflicting provisions of this injunction.

(h) **Applicability.** This rule applies to all parties other than the Office of Recovery Services.

Mr. Hunnicutt moved to recommend the rule as written above to the Supreme Court. Judge Stucki seconded. The motion passed.

(4) CIVIL RULE 58 AND APPELLATE RULE 4

Ms. Sylvester and Mr. Hafen introduced the concerns of the Supreme Court regarding Rule of Civil Procedure 58 and Appellate Rule 4. The Supreme Court was concerned that these two rules in concert created a "trap for the diligent," as Paul Burke said. This was demonstrated in the recent Court of Appeals case, *McQuarrie v. McQuarrie*, 2017 UT App 209. In *McQuarrie*, the husband appealed a district court order that awarded the wife attorney fees with the amount to be determined at a later date. The wife moved for summary disposition because, she argued, the husband did not appeal from a final order. The Court of Appeals agreed with the wife and dismissed the appeal. But there is an argument that the husband didn't have a choice but to appeal at that time since the finality of the order was not clear. Mr. Slauch proposed reconstituting the Rule 58 subcommittee to evaluate the rules. Judge Mettler said she would work with the subcommittee to discuss the changes needed.

(5) ADJOURNMENT

The committee adjourned at 5:45 p.m. The next meeting will be held on June 27, 2018 in the Judicial Council Room of the Matheson Courthouse.