

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

Meeting Minutes June 27, 2018

PRESENT: Chair Jonathan Hafen, Rod Andreason, Barbara Townsend, Judge Kate Toomey, Susan Vogel, Katy Strand (Recording Secretary), Judge Andrew Stone, Judge Amber Mettler, Judge Laura Scott, Judge Kent Holmberg, Leslie Slaugh, Trystan Smith, Paul Stancil, Dawn Hautamaki, Lauren DiFrancesco, Jim Hunnicutt, Judge Clay Stucki.

EXCUSED: Judge James Blanch, Michael Petrogeorge, Justin Toth, Lincoln Davies, Heather Sneddon.

GUESTS: Chief Justice Matthew B. Durrant, Brent Johnson

STAFF: Nancy Sylvester

(1) WELCOME AND REMARKS FROM CHIEF JUSTICE DURRANT.

Jonathan Hafen welcomed everyone to the meeting and turned the floor over to Chief Justice Matthew B. Durrant. Chief Justice Durrant thanked Barbara Townsend and Judge Kate Toomey for their service on the committee. Judge Toomey has served for 12 years, Ms. Townsend 10. He also stated the Court was consistently impressed with the results of the committee and expressed recognition for the work of the committee.

(2) APPROVAL OF MINUTES.

Mr. Hafen requested a motion on the May minutes. Judge Toomey moved to approve the minutes, Rod Andreason seconded and the motion passed.

(3) RULES 4, 11, 55 AND 63 REVIEW OF COMMENTS.

Mr. Hafen and Nancy Sylvester introduced the comments, which had been submitted on the above referenced rules. There were no comments on these rules as proposed. Judge Toomey questioned if they had correctly gone out, Ms. Sylvester confirmed they had. Leslie Slaugh pointed out that no votes were needed to approve the rules as they had been adopted on an expedited basis by the Court.

(4) RULES 101 AND 105 REVIEW OF COMMENTS.

Ms. Sylvester introduced the comments to the above referenced rules. She noted that the commenters addressed the policy behind the rules, which was legislatively created. The amendments were simply in conformity with that legislation. Jim Hunnicutt moved to approve Rules 101 and 105. Paul Stancil seconded and the motion passed.

(5) RULE 73 ATTORNEYS FEES, REVIEW OF COMMENTS.

Ms. Sylvester introduced the comments to Rule 73. She said that based on the comments, the committee appears to be on the right track. She noted the concerns, primarily with respect to the cost of practicing law and the presumptive fee amounts in debt collection cases. Mr. Slauch noted that the attorneys who have a large volume of these cases proposed these amounts and for the others, they still have the option of filing an affidavit. Judge Andrew Stone pointed out that if a large number of people are filing affidavits it may be worth revisiting later. Ms. Sylvester proposed reviewing the data next June.

Ms. Sylvester reported that several comments requested education of the courts and lawyers on the rule amendments. Dawn Hautamaki offered to take this to the clerks of court. Ms. Sylvester said there were also comments that the hearing requirement may be unnecessary. Susan Vogel expressed concerns that the summons appeared to require pro se litigants to answer the complaint, which may unnecessarily increase fees for litigants who don't have colorable defenses.

Regarding the need for hearing, Judge Andrew Stone noted that for efficient attorneys, if there is no hearing there is little work in the undisputed case. He said the fees should be based upon efficient attorneys. Judge Clay Stucki said that \$350 was the average attorney fee in his Court and noted that the filing of an answer is exceptionally rare. In the contested cases, he said the judge can help litigants understand the results and fees. He believed \$350 was a fair amount, as the cost to get a judgment does not increase if the amount increases.

Judge Kent Holmberg reviewed the changes by Charles Stormont and Mark Olson. The first comment was to separate the rule at line 50 to clarify that the paragraph applied to any of the rules above. Mr. Olson proposed garnishments to a new employer should allow for an increased fee of \$75. He proposed that the first line in the schedule of post judgment fees say: "Application for any writ under Rules 64, 64A, 64B, 64C, 64D, or 64E including 1st application for a writ under Rule 64D to any particular garnishee."

The committee reviewed several other comments in which commenters said the post-judgment schedule did not allow for enough fees. The attorneys believed that the follow-up calls from employers were taking up significant time for which they should be compensated. Ms. Vogel noted that the Self-Help Center received many of these calls from employers, and that she didn't believe the calls take much time. Mr. Hunnicutt said the first time a small employer receives a garnishment, they may have questions, but that it is uncommon. Ms. Sylvester pointed out that it is also possible in this situation to file an affidavit, just in case it is too far off. Mr. Hafen noted that although a number of the comments did not express approval of the rule, the ability to file an affidavit obviated many of the concerns expressed. Ms. Vogel also pointed out that over all defaults, the increased fees for low dollar cases would add over \$3,971,000 in fees across the state, and that this is not an insignificant increase.

Judge Toomey moved to make the changes proposed by Mr. Olson and Mr. Stormont. Judge Stone seconded and the motion passed.

(6) RULE 24 RESOLVING DIFFERENCES WITH URCrP 12 AND URAP 25A.

Mr. Slauch introduced Rule 24. He said the amendments are designed to help clarify the ability to bring up constitutional questions. The rule in a uniform way provides for notice to be given to an affected executive branch entity but does not create waivers of these claims for non-notice. Mr. Slauch noted that the amendments meet the needs of the AG but doesn't run the risk of harming any litigant if they do it wrong, although it may slow them down pending reminder of the notification requirement. Judge Holmberg spoke with the AG's office and reported they were in support of this clarification. Ms. Vogel questioned if any pro se litigants were able to utilize this rule. Mr. Slauch pointed out that this won't hurt their claims; judges will just reschedule the hearing as needed. Judge Toomey noted that the pro se litigants don't lose anything but time. Mr. Hunnicutt opined that most of these claims are unreasonable and typically unsuccessful, particularly in the domestic context. He said that parties may claim constitutional issues but don't end up ultimately pursuing them.

Mr. Stancil questioned whether the committee should clarify that these are not federal statutes. This rule is mirrored on a federal statute, so this may need clarification. Mr. Hafen proposed changing the heading at paragraph (d) to "Constitutionality of Utah statutes and ordinances." Mr. Andreason expressed concern that because we do not use this term every time, this would open the door to an argument that we are referring to all statutes in every other instance. Mr. Slauch argued that in most other areas the rules are referencing all of the statutes, not only Utah statutes.

Ms. Vogel proposed editing line 12 to state "when a party to an action bases a claim or defense upon..." Mr. Andreason said the rule language is archaic, and that it should be improved. Ms. Sylvester questioned if the original language was based upon a statute. Mr. Hunnicutt proposed looking at the federal rule to more closely follow that language since it was recently revised.

Ms. Sylvester and Mr. Hafen proposed that Mr. Hunnicutt head a subcommittee to rewrite this rule for additional and clearer language using the federal rule as a template. They noted that this may also require reviewing the appellate and criminal rules.

(7) RULE 26 ASSIGNMENT OF SUBCOMMITTEE. DEADLINE FOR REPORT IS SEPTEMBER MEETING.

Mr. Hafen reported that there have been a number of requests to amend Rule 26, and since it has been 7 years since the rule overhaul, it may be a good time to reopen the rule. Mr. Slauch pointed out that the proposed amendments are not about an overhaul, but just closing up some gaps in the rule. Judge Toomey said she believed this should be a high priority based upon the needs of the Forms Committee. Ms. Sylvester noted that other states have updated their discovery rules in the past 7 years.

Several members of the committee provided proposals on Rule 26. Trystan Smith, Tim Pack, and Mr. Slauch volunteered for this committee. Mr. Andreason was assigned to chair the subcommittee. Mr. Hafen proposed asking the Bar for technical issues with Rule 26, but not to "open" the rule to the bar entirely. Mr. Hafen and Ms. Sylvester will work with the subcommittee on the language of the email to the Bar.

(8) ORDER TO SHOW CAUSE RULE: INTRODUCTION AND ASSIGNMENT OF SUBCOMMITTEE. DEADLINE FOR REPORT IS SEPTEMBER MEETING.

Mr. Hafen introduced the proposal of removing the requirement of Orders to Show Cause and turning it into general motion practice. Brent Johnson reported that there are problems with not having a consistent rule for “order to show cause” practice. This conflict will become an additional problem when the Licensed Paralegal Practitioner program begins. The Forms Committee attempted to create statewide forms for the LPPs to use, but there is no way to do it since the procedures statewide are inconsistent. The Forms Committee believed combining the 5th and 6th districts rules would make things more consistent. Judge Toomey pointed out that LPPs will start practicing in a year or two, and that this clarification will be essential for this new profession, as well as UVU’s curriculum for this new profession. Ms. Vogel pointed out that this rule would create 2 hearings LPPs could not attend.

Mr. Slaugh is concerned with the entire idea of turning orders to show cause into motion practice, as orders to show cause are often used for non-parties over whom the court does not have jurisdiction. He does not believe a motion is the correct tool without a statutory change. Mr. Johnson pointed out that this was intended to be only to enforce existing orders. Mr. Hunnicutt expressed confusion about how this will work, as there is no notice of hearing clearly in the rule. Mr. Johnson stated this would be like motion practice, but Mr. Slaugh pointed out that the court would be required to serve notice of the hearing.

Mr. Hafen proposed creating a subcommittee to evaluate all of these questions. Ms. Vogel, Mr. Hunnicutt and Judge Holmberg will be on the committee. Lauren DiFrancesco was assigned to chair the subcommittee.

(9) ADJOURNMENT.

The committee adjourned at 5:17 p.m. The next meeting will be held on September 26, 2018 in the Judicial Council Room of the Matheson Courthouse.