UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – November 28, 2018

PRESENT: Chair Jonathan Hafen, Heather Sneddon, Judge Laura Scott, Judge Andrew Stone, James Hunnicutt, Rod Andreason, Larissa Lee, Susan Vogel, Judge Clay Stucki, Leslie Slaugh, Trevor Lee, Justin Toth (phone), Judge James Blanch, Judge Amber Mettler, Timothy Pack, Judge Kent Holmberg, Katy Strand (Recorder), Lincoln Davies, Michael Petrogeorge, Bryan Pattison (phone), Dawn Hautamaki

EXCUSED: Paul Stancil, Trystan Smith, Lauren DiFrancesco

STAFF: Nancy Sylvester

GUESTS: Judge Douglas Thomas

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(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and guest, Judge Douglas Thomas. Mr. Hafen asked for corrections or approval of the minutes. Susan Vogel requested to correct the minutes as to the Labor Commission hearing on pages 3, 4, and 5. With those changes, Jim Hunnicutt moved to approve the minutes and Rod Andreason seconded. The motion passed unanimously.

(2) UPDATES ON LABOR COMMISSION ISSUES AND FINALITY RULES (URCP RULES 73, 58A; URAP RULE 4)

Johnathan Hafen reported that following last month's meeting, the Labor Commission withdrew its proposed rule and plans to move forward with a new legislative solution.

(3) NEW RULE 7A. MOTION FOR ORDER TO SHOW CAUSE

Mr. Hunnicutt reported that a few years ago, Rule 7A was proposed to standardize motions for orders to show cause. The rule would be more rigid than current practice across the state; a single hearing could not result in a contempt of court finding. The rule came up again as the Forms Committee is preparing for the paralegals to practice law next year. The 5th and 6th districts currently prefer and use two hearings (the two-step process), while the rest of the state permits a single hearing for contempt proceedings.

Judge Thomas said he feared that a rule mandating a two-step process would institutionalize inefficiency. The Judicial Council has made the policy decision to streamline the domestic case process, and the 7th district is a pilot site. He opined that this proposal would be antithetical to that decision. He said most orders to show cause are in domestic relation cases or in hearings for failure to appear in response to supplemental orders. When the motion is contested, the courts presume that

the parties will be ready to argue it, unless the parties request more time in advance. The one-step process is particularly valuable in rural districts, where distance and travel are concerns. Judge Thomas noted that Rule 101 allows for significantly more time if you wish to have a commissioner hear the case (7 days for a judge versus 28 for a commissioner), which doesn't make much sense. The proposed change may overly complicate the process and could result in even more hearings. He added that not all orders to show cause proceedings involve contempt; contempt is often alleged, but not often tried.

Ms. Vogel opined that the additional time and effort provided in the new proposal may be too cumbersome for pro se litigants. Judge Blanch said he believed this was really an issue of making sure all parties understand what the hearings are for. He said he often finds that a telephonic conference clears up this confusion. Either way, clarity is the most important thing. Mr. Hafen proposed making the time frame 28 days to have the time be acceptable and clear.

Judge Stucki questioned why the other districts preferred the two-step process. Bryan Pattison reported that the two-step process was created to help parties both to know what to expect and what is expected of them. He said parties and attorneys in St. George like the rule because it is clear. Judge Holmberg reported that in Summit County, the first hearing is by telephone. He said this has helped attorneys and made pro se litigants more comfortable because they know what will happen at the in-person hearing.

Leslie Slaugh said either way, there should be a uniform rule. Judge Blanch reported that they could explicitly require a telephonic hearing if requested, which would avoid some costs. Mr. Hafen proposed replacing "first hearing" with "telephonic scheduling conference." He observed that court processes are generally more efficient when there is early judicial intervention, and many issues could be resolved early by phone. Judge Stone said he opposed any rule that required a telephonic conference, but perhaps like in Rule 37, it could be recommended. Judge Scott said that telephonic conferences can be very difficult when a large number of parties and/or interpreters are involved. Judge Stone reported that he has not experienced confusion with the current process, since the Third District uses domestic commissioners. Mr. Hafen pointed out that almost half of the districts have no commissioners, so the rule would need to be "one size fits all."

Judge Scott questioned why there is a motion for order to show cause instead of for sanctions. Mr. Slaugh reported the statute for contempt mentions orders to show cause. Judge Thomas reported that ORS files the vast majority of orders to show cause, and that people often stipulate to the contempt and are given "purge conditions," with the hearing set out for reviews. All of this takes place at the first hearing, before the evidentiary hearing. Ms. Vogel questioned how the rule contemplates a commissioner hearing the motion. Will parties now be presenting evidence and witnesses? And how will this impact the pro se calendars?

Timothy Pack asked if, under this rule, an opposition to the motion is contemplated or allowed. Judge Scott stated that in non-domestic cases, these motions often have full briefing, but it is not in the rule. Mr. Pack said he would file the opposition no matter what the rule said. Ms. Vogel pointed out that the pro se forms include an opposition. Mr. Slaugh observed out that the current rules prohibit using the order to show cause process to obtain an injunction, which is different from historic methods and from other jurisdictions. He also questioned whether the contempt statute

could be amended to allow for normal motion practice. Mr. Hafen proposed approaching the legislature on this topic. Judge Holmberg mentioned that an order to show cause may be stronger than a motion, as people react more strongly to orders.

Judge Blanch questioned whether the advisory note would be enough to keep this rule out of criminal cases. Mr. Hafen and Ms. Sylvester said it would be best to have domestic-only application of the rule be in the language of the rule, as it is substantive.

Ms. Vogel suggested that the forms be moved into one document, with the motion and the statement supporting it. Ms. Sylvester pointed out that other rules require the memorandum and motion to be in one document. Judge Blanch agreed that any motion and memorandum should be one document. Mr. Hafen clarified that a declaration may be a different document. Judge Blanch proposed incorporating Rule 7 into the new rule to avoid this problem.

Mr. Hunnicutt questioned whether the local rules could be overridden by the Supreme Court's rules; Ms. Sylvester said they could.

Mr. Hafen asked how many of the committee members supported providing uniformity. Nearly the entire committee supported uniformity. Mr. Hafen proposed that the subcommittee work on this rule further.

(4) RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY (MULTIPLE REQUESTS FOR RULE AMENDMENTS)

Mr. Andreason reported that the subcommittee reviewed the comments from the practitioners and judges regarding Rule 26 and created a list of proposed changes. He did not believe any of these were major changes, but would make the documents more compliant with Rule 34 and would revise the timeframes.

In particular, the initial disclosures must be compliant with Rule 34. Paragraph (a)(2)(A) would change to ensure that multiple plaintiffs joining at a later date would have timing based upon the date of their joining the case. Ms. Vogel proposed inserting the word "the" before "filing of the first answer" for clarity. Mr. Andreason agreed.

On lines 27 and 28, a similar clarification was proposed for defendants. Ms. Vogel proposed that it would be clearer if it said "by a defendant within 42 days of that defendant filing its first answer to the complaint." Mr. Pack proposed adding a "the" to make it parallel to the paragraph above. Judge Stucki did not see how it could be confusing to have a defendant followed by that defendant, he believed the language to be quite clear. Heather Sneddon agreed that adding "the" was sufficiently clear.

In heading to paragraph (a)(4)(A), the word "retained" was proposed to be added to clarify that it only applied to retained experts. Judge Stone reported that the requirements in line 49 are often highly problematic. A medical doctor may rely upon a huge amount of information that they may not cite. Judge Holmberg reported that arguments have been made that an expert must provide the whole file of information they relied upon in reaching their conclusions. Mr. Slaugh proposed changing it to state "specific to the case." Larissa Lee proposed adding a materiality requirement. Judge Stone proposed that published materials be excluded, and he believed that "gathered or

collected for the case" would solve the problem. Mr. Petrogeorge said he believed that if they were relying upon something to form an opinion, it was relevant to the case, and was already limiting. Judge Scott proposed that some of this be provided in the report or deposition, but that it was not relevant to the purpose of the disclosure. Judge Blanch pointed out that the committee must be realistic that lawyers will always find ridiculous arguments, although some can be avoided. Mr. Hunnicutt proposed copying the federal rule, which removes the word "all." Trevor Lee reported this was added to make clear that drafts were not required. Mr. Petrogeorge did not believe this would limit the requirements enough.

The discussion on this was tabled until the next meeting.

(5) RULE 4. STANDARDS FOR ELECTRONIC ACCEPTANCE OF SERVICE. SUBCOMMITTEE UPDATE AND REQUEST FOR FEEDBACK

Judge Scott reported that the subcommittee looked into the issue of electronic acceptance of service. She said the committee did not believe that this could be used in lieu of personal service, but it could be used for acceptance of service. Ms. Vogel pointed out that under Rule 4, alternative service was still an option, but a judge must make a determination to allow electronic personal service. She also stated that someone could challenge the particular instance.

Mr. Hafen questioned if the committee notes were the correct place to address these deceptive practices. Judge Holmberg said he believed that there was a statute that disallowed some of these practices. Mr. Hafen said the note could refer to the statute. Judge Blanch pointed out that there is a duty to accept service, the point of which is not to allow others to avoid service. All a person should be entitled to is the setting aside of a default if service was not correct. Ms. Vogel pointed out that people should be able to see what they are accepting, to be sure that they are the correct parties. Mr. Slaugh added that accepting service without seeing the documents was problematic. Statements that a party must do something create problems; acceptance should be knowing and not intimidated. Mr. Slaugh proposed a note stating the committee relied upon judges to determine if the methods of service used were fair; the note could also include references to the statutes. Judge Stone reported that parties are not showing what processes were used to ensure that the correct party was served. Judge Stone stated that particular language could be required in an acceptance of service. Mr. Slaugh said this would be too cumbersome if the person accepting service is an attorney. Mr. Hafen said he believed this would be a different situation from the one the committee was discussing.

Ms. Sylvester proposed referencing a form. Judge Stone questioned whether attorneys should have separate requirements. He pointed out that sometimes, obtaining jurisdiction is a part of service, and so the requirement to accept service, or the method of service, was about more than setting aside defaults. He was most concerned with the proof of acceptance of service, as usually it was not enough. Ms. Sylvester proposed that the rule include a requirement that the return of service demonstrate on its face that it conforms with the Electronic Signature Act.

Heather Sneddon proposed moving the language on the Electronic Signature Act close to the language for Acceptance of Service by a Party, to avoid requiring additional language from attorneys. Judge Stucki proposed placing the deceptive practices language in the portion of the rule stating who cannot be served. Judge Blanch continued to question how non-mandatory acceptance

is; he said he did believe that it is deceptive to indicate that it is imperative to accept the service. Lincoln Davies proposed separate language regarding allowing a party to see the documents, as well as language opposed to deception, as these are different issues. Judge Stone was most concerned that this not be confused with acceptance of service; he insisted that acceptance is voluntary. Ms. Sneddon proposed that a form for request of service could eliminate this problem. Mr. Hafen asked that the subcommittee look at all of these issues and come back at the committee's next meeting to discuss their proposal.

(6) RULE 24: INCORPORATING THE FEDERAL LANGUAGE

Ms. Sylvester reported that proposed Rule 24 now incorporates the federal language. The federal amendments largely removed archaic language; Ms. Sylvester then replaced "shall" with "must." She queried whether the language regarding federal law or executive orders should still be included. Mr. Hunnicutt said he thought that the language about federal law was superfluous. He believed this would mirror the language for no reason. Mr. Davies pointed out that this language would allow for state cases, which could have been filed in federal court, to be adjudicated the same way it would be in federal court. Mr. Hunnicutt questioned whether the structure of the rule would be better if the language of Rule 4(d)(1)(F) for service of governmental agencies was used. Judge Stucki believed that the attorney general should be giving the agencies notice. Judge Holmberg reported that the attorney general's office is not set up or charged with providing notice to all of the agencies or subdivisions in the state. Ms. Vogel requested that the word "pleading" be more specific on line 27. She proposed that it say "memorandum." Mr. Slaugh said he believed it should be "complaint" or "petition." Ms. Lee questioned what a timely motion from the Attorney General's office was, and proposed that a specific time frame be included. Mr. Slaugh said the deadline could fit into line 33, but not 38. Ms. Lee proposed that the government be given a deadline for submitting its intention to intervene, but allow a timely motion for the actual arguments. Judge Holmberg proposed asking the Attorney General's office what the time frame should be. Ms. Sylvester agreed to reach out and determine what the time limit should be. Mr. Hafen proposed taking this to the Court and mentioning the timely motion issue to them for their opinion. Ms. Sylvester proposed adding a line regarding a requirement for a notice of intent to intervene. It was agreed that the committee would discuss this with the Attorney General's office before sending it to the Court.

(7) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 6:06 pm. The next meeting will be held January 23, 2018 at 4:00 pm.