UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – January 23, 2019

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

EXCUSED: Trystan Smith, James Hunnicutt, Rod Andreason, Judge Amber Mettler

STAFF: Nancy Sylvester

GUESTS: Katie Gregory

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(1) WELCOME AND APPROVAL OF MINUTES.

Jonathan Hafen welcomed the committee and guest. He asked for approval of the minutes. Susan Vogel asked to correct several issues. She then moved to approve the corrected minutes. Leslie Slaugh seconded. The motion passed unanimously.

(2) CIVIL RULE 58B AND JUVENILE RULE 58.

Nancy Sylvester explained that the legislature passed a law allowing for juvenile courts to enter orders for restitution, but did not provide for how to enforce them. The proposed rules would allow the courts to send the orders to the district courts. Katie Gregory reported that this bill went into effect last July, but that there is no procedure to collect on these orders. There was a concern about confidentiality for the juvenile, but as of January 1, the Code of Judicial Administration allows these filings to be private records. Lauren DiFrancesco questioned if the name of the juvenile would be a part of the record, as this will not be sealed. Dawn Hautamaki reported that when these are filed they are done in the name of the victim. She does know that it is a special type of judgment, but that the juvenile restitution case type will be protected. Judge Clay Stucki stated that the victim would probably want the name in the judgment, as the ability to search it in financial situations would be needed for collection. Judge Andrew Stone questioned what the purpose of a judgment was, other than to publicize the debt. Ms. Hautamaki noted that the victim does not have a say in if this judgment is filed. Judge Stucki questioned if the judgment could stand alone, so that no information other than the debt would be included.

Leslie Slaugh reported that this is exactly what an abstract does: it lists only the amount, the debtor, and the creditor. Ms. Hautamaki agreed that this was correct. Mr. Hafen noted that this question exceeded the scope of the committee's concern, but seemed to be related to the issue. Heather

Sneddon said she wondered whether the victim should have the choice to have the abstract sent to the district court. Mr. Slaugh responded that the statute does not require it to be registered with the district court, so the victim could choose to collect or not.

Mr. Hafen responded that the only amendment the committee was considering was at lines 4 to 5. Mr. Slaugh questioned if the civil rules should require something to let the juvenile court know the judgment had been satisfied. Mr. Hafen proposed adding "and the juvenile court" so that both courts would be notified. Ms. Gregory proposed the rule be voted on, but not submitted to the Court until the juvenile committee approved it. Judge Stucki moved to adopt the amended rule below, Ms. Sneddon seconded. The motion passed unanimously.

Rule 58B. Satisfaction of judgment.

(a) Satisfaction by acknowledgment. Within 28 days after full satisfaction of the judgment, the owner or the owner's attorney must file an acknowledgment of satisfaction in the court in which the judgment was entered. <u>If the judgment was entered in juvenile court and abstracted to the district court, the satisfaction of judgment must be filed in the district court and the juvenile court.</u> If the owner is not the original judgment creditor, the owner or owner's attorney must also file proof of ownership. If the satisfaction is for part of the judgment or for fewer than all of the judgment debtors, it must state the amount paid or name the debtors who are released.

(b) Satisfaction by order of court. The court in which the judgment was first entered may, upon motion and satisfactory proof, enter an order declaring the judgment satisfied.

(c) Effect of satisfaction. Satisfaction of a judgment, whether by acknowledgement or order, discharges the judgment, and the judgment ceases to be a lien as to the debtors named and to the extent of the amount paid. A writ of execution or a writ of garnishment issued after partial satisfaction must include the partial satisfaction and must direct the officer to collect only the balance of the judgment, or to collect only from the judgment debtors remaining liable.

(d) Filing certificate of satisfaction in other counties. After satisfaction of a judgment, whether by acknowledgement or order, has been entered in the court in which the judgment was first entered, a certificate by the clerk showing the satisfaction may be filed with the clerk of the district court in any other county where the judgment has been entered.

(3) ADVISORY COMMITTEE NOTES PROJECT GROUP A.

Trevor Lee reported that the rules were divided and that the subcommittee determined that a large number of the notes should be removed based upon the Supreme Court's guidance. The committee determined that "historical context" did not include notes on how the rule has been. Mr. Slaugh pointed out that these comments are less helpful as the changes are available on the court's site. Mr. Hafen pointed out that the committee could inform the bar of this website. Ms. Vogel questioned where this information is available. Ms. Sylvester proposed updating the rules website to make more clear that the amendments link included historic rule changes.

Mr. Lee reported on the proposed changes to the notes in rule 1. Mr. Hafen questioned if the goals of the committee should be removed, as the committee does not do anything but recommend rule amendments. It's the court's role to actually make the amendments. Judge Stone proposed that it be removed, as the purpose should not be included. Mr. Hafen questioned if the statement of how the rules applied should be a part of the rule, as it was substantive. He proposed taking out the word "committee" but leaving in the remainder. Mr. Slaugh questioned if this was necessary, as any proceeding would have it apply, as nothing says they don't apply. Timothy Pack proposed deleting line 1. Ms. Hautamaki proposed removing the entire last paragraph. Ms. Sylvester asked whether all the pre-November 2011 rules should be removed. Judge Stone reported that cases from that time frame are still being litigated, so the rules should remain readily available. Ms. Sylvester said the last paragraph should remain then. Judge Stone moved to approve the amended/removed note, Ms. DiFrancesco seconded. Motion passed. The note reads as follows:

> A primary purpose of the 2011 amendments is to give effect to the long-standing but often overlooked directive in Rule 1 that the Rules of Civil Procedure should be construed and applied to achieve "the just, speedy and inexpensive determination of every action." The amendments serve this purpose by limiting parties to discovery that is proportional to the stakes of the litigation, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses and evidence that a party intends to offer in its case-in-chief. The purpose is to restore balance to the goals of Rule 1, so that a just resolution is not achieved at the expense of speedy and inexpensive resolutions, and greater access to the justice system can be afforded to all members of society.
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> Due to the significant changes in the discovery rules, the Supreme Court order adopting the 2011 amendments makes them effective only as to cases filed on or after the effective date, November 1, 2011, unless otherwise agreed to by the parties or ordered by the court.

Ms. DiFrancesco proposed removing the entire note to rule 3. She said all of the historical notes were too old, the change referenced was pre-1993, and self-evident at this point. Mr. Lee agreed and added that even if the amendments were recent, he did not believe the note should be included. Ms. DiFrancesco moved to delete this note. Larissa Lee seconded. Motion passed.

Ms. Vogel reported that Rule 4 was a difficult rule for pro se litigants. Her proposal included the items she found people were confused about, particularly the fact that they cannot serve papers themselves, how to do service by mail, the concerns about electronic acceptance of service, and how international service is more complicated than pro se litigants know. She suggested letting people know that embassies may be helpful and also that alternative service requires that the litigant provide the proposed alternative, not the judge.

Mr. Hafen questioned whether Ms. Vogel's notes were more of a guide than an example. Ms. Sylvester proposed linking to the courts' self-help resource pages. Mr. Slaugh expressed concern that explaining that the judge would not propose an alternative service would be an interpretation of the rule, and not appropriate for a note. Judge James Blanch said what Ms. Vogel had proposed might work better as a guide for the Self-Help Center. Mr. Hafen agreed and said he believed that such a guide would be even more helpful than a committee note. Ms. Vogel thought it would be nice to at least link to the self-help webpage. Mr. Hafen proposed that this note be tabled, that the subcommittee look at adding a link to the webpage and scaling down the note. Judge Blanch also questioned focusing solely on the pro se litigant, as the rules apply equally to all. Judge Laura Scott asked what the Supreme Court meant by including examples. She wondered if the committee could ask for additional guidance. Mr. Hafen agreed that the question needed to be discussed.

Mr. Pack questioned whether any of the notes for Rule 4 were necessary. Mr. Hafen said he believed that if the changes were not substantial and recent, the notes should be removed. Ms. DiFrancesco agreed, and noted that if the year was included with a note, it would be more helpful. Paul Stancil said he thought explaining the changes to the rules was an artifact of the past and not necessary anymore. So he supported eliminating these notes. Mr. Pack said that if the rule is clear there should be no notes. Lincoln Davies agreed with Mr. Pack; unless there is need for explanation (as in the situation where the federal rules are very different), notes are not helpful, and if there is a note, the date should be included. The committee generally agreed with this philosophy.

Larissa Lee introduced the notes to Rule 5. She said most of the notes are dated or inapplicable. Mr. Slaugh proposed removing the juvenile court portion out of the rule and having a separate rule in the juvenile rules. Until such a rule is adopted, Ms. Lee proposed leaving the note. She also proposed keeping in the notes regarding the case. Mr. Slaugh believed that cases interpreting rules should not be included, but if they amend the rule they should. Mr. Hafen proposed leaving in the 2015 note, and no additional notes. Judge Stucki moved to approve the note below. Mr. Slaugh seconded. The motion passed unanimously.

URCP 5.

Advisory Committee Notes

2015 amendments

Since the Rules of Juvenile Procedure do not have a rule on serving papers, this rule applies in juvenile court proceedings under Rule 1, Rule 81(a), and Rule of Juvenile Procedure 2.

> Under paragraph (b)(3)(A), electronically filing a document has the effect of serving the document on lawyers who have an e-filing account. (Lawyers representing parties in the district court are required to have an account and electronically file documents. Code of Judicial Administration Rule 4-503.) The 2015 amendment excepts from this provision documents electronically filed in juvenile court.
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> Although electronic filing in the juvenile court presents to the parties the documents that have been filed, the juvenile court e-filing application (CARE), unlike that in the district court, does not deliver an email alerting the party to that fact. The Board of Juvenile Court Judges and the Advisory Committee on the Rules of Juvenile Procedure believe this difference renders electronic filing alone insufficient notice of a document having been filed. So in the juvenile court, a party electronically filing a document must serve that document by one of the other permitted methods.

Ms. Vogel proposed giving an example regarding service by mail. Mr. Slaugh said he thought that this would modify the rule. He proposed amending paragraph (d) to copy the federal rule. Judge Stucki proposed replacing the word "was" with the word "is." Mr. Slaugh questioned whether this would still allow for the presumption that it was served. Ms. Vogel proposed it state "on whom it is served that day." Judge Blanch agreed with bringing the rule in line with the federal rule, and perhaps the court form could be changed. Ms. Vogel proposed changing the tense, and changing the forms. Ms. Sneddon supported filing the certificate of service after the filing. Judge Blanch supported changing the forms rather than changing the rule. Michael Petrogeorge agreed. Judge Scott proposed removing what was required in the rule. Mr. Hafen tabled this discussion for the next meeting.

Mr. Lee introduced the notes to Rule 7. He proposed removing all the notes. He said he would consider exempting the discussion of the Supreme Court case, but believed it was unnecessary as the rule is clear enough. Ms. Sylvester noted that the committee has referenced the language about judges issuing orders in many forms. Ms. Sneddon said she would like the Court to provide more insight. Mr. Hafen noted that the redline the Court reviewed would itself invite feedback. Mr. Slaugh said he believed the note should exist, but be dated. Judge Stucki said he thought that would be inconsistent. Mr. Slaugh argued that historical notes are valuable, but could have a sunset period. This discussion was tabled until after the Court has provided additional guidance.

Ms. Hautamaki proposed deleting the notes on Rule 77, as the notes are old and not relevant. Ms. Lee so moved and Mr. Stucki seconded. The motion passed unanimously.

(4) RULE 109 REVISITED: RECOMMENDATION FROM CLERKS OF COURT RE CLARIFYING LANGUAGE IN (d).

Ms. Sylvester reported that she spoke with the Clerks of the Court, who asked for clarifying language regarding who serves the injunction referenced in Rule 109. They would like it to be clear that the court is not doing it. Mr. Slaugh said he did not believe it is important how it is served, only that it is served. The proposed change required that a particular person serve it, and that is too

limiting. Ms. Vogel added that a protective order may not allow the petitioner to provide it to the respondent. Ms. Hautamaki stated that the concern was that the court was not responsible for this service. Mr. Hafen does not believe the current rule mandates that the court do anything. Judge Stone argued that there might be times when the court does need to serve it. Judge Kent Holmberg argued that there are many rules like this where the court is not required to serve things. The committee declined to change this rule.

(5) RULE 24: REPORT FROM ATTORNEY GENERAL'S OFFICE ON "TIMELY"

Ms. Sylvester reported that the Attorneys General's office responded to the committee questions on what was timely. Mr. Slaugh proposed changing the language to reference papers, not pleadings. He also proposed adding the language below as well as the language proposed by the Attorney General's office. Mr. Hafen proposed this be tabled to the next meeting.

Rule 24. Intervention.

(a) Intervention of right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(d) Constitutionality of Utah statutes and ordinances.

(d)(1) **Challenges to Utah statutes.** If a party challenges the constitutionality of a Utah statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C).

(d)(1)(A) **Form and Content**. The notice must (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(d)(1)(B) **Timing**. The party must serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(d)(1)(C) **Service**. The party must serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, and file proof of service with the court.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(d)(1)(D) **Attorney General's response to notice.**

(d)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General must file a notice of intent to respond unless the Attorney General determines that a response is unnecessary. The Attorney General may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(d)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted by this rule, the court will allow the Attorney General to file a response to the constitutional challenge and participate at oral argument when it is heard.

(d)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney General's response to the constitutional challenge will be filed within 14 days after filing the notice of intent to respond.

(d)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General's decision not to respond under this rule.

(d)(2) **Challenges to county or municipal ordinances**. If a party challenges the constitutionality of a county or municipal ordinance in an action in which the district attorney, county attorney, or municipal attorney has not appeared, the party raising the question of constitutionality must notify the district attorney, county attorney, or municipal attorney of such fact. The procedures for the party challenging the constitutionality of a county or municipal ordinance will be as provided in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C), except that service must be on the individual county or municipality. The procedures for the district attorney's, county attorney's, or municipal attorney's response will be as provided in paragraph (d)(1)(D).

(d)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice. It is the party's responsibility to find and use the correct email address for the relevant district attorney, county attorney, or municipal attorney, or if circumstances prevent service by email, it is the party's responsibility to find and use the correct mailing address.

(6) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:49 pm. The next meeting will be held February 27, 2019 at 4:00 pm.