

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

Summary Minutes – July 28, 2020

**DUE TO THE COVID-19 PANDEMIC AND STATE OF EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

Committee members, staff & guests	Present	Excused	Appeared by Phone
Jonathan Hafen, Chair	X		
Rod N. Andreason		X	
Judge James T. Blanch		X	
Lauren DiFrancesco		X	
Judge Kent Holmberg	X		
James Hunnicutt	X		
Larissa Lee		X	
Trevor Lee	X		
Judge Amber M. Mettler	X		
Timothy Pack	X		
Bryan Pattison	X		
Michael Petrogeorge		X	
Judge Clay Stucki		X	
Judge Laura Scott	X		
Leslie W. Slauch	X		
Trystan B. Smith	X		
Heather M. Sneddon		X	
Paul Stancil	X		
Judge Andrew H. Stone		X	
Justin T. Toth		X	
Susan Vogel	X		
Brooke McKnight	X		
Ash McMurray	X		
Nancy Sylvester, Staff	X		
Michael Drechsel, Guest	X		

(1) WELCOME AND APPROVAL OF MINUTES

Jonathan Hafen welcomed the committee and asked for approval of the minutes. James Hunnicutt moved to approve the minutes. Susan Vogel seconded the motion. The minutes were approved unanimously.

(2) RULE 83

Nancy Sylvester introduced a legislative request for the committee to amend Rule 83, which addresses vexatious litigation. Ms. Sylvester introduced Michael Drechsel to provide additional background. Mr. Drechsel explained that Senator Diedre Henderson expressed concerns with Rule 83 in response to constituents who have contacted her and claimed to be the target of vexatious litigation by former spouses; Rule 83 currently applies only to unrepresented parties, which has reportedly allowed represented parties in the domestic context to engage in litigation intended to harass their former spouses. Mr. Drechsel noted that courts may take action against an attorney, but not the represented client, who is engaging in litigation intended to harass another party. Mr. Hafen expressed the committee's interest in addressing the issue and asked Mr. Hunnicutt to comment.

Mr. Hunnicutt commented that family-law litigation can pose a particular challenge for parties who often feel harassed due to the nature of the issues at stake. Mr. Hunnicutt noted that because courts already have the ability to sanction attorneys under Rule 11, expanding Rule 83 to include represented parties could create a problem for judges who may need to choose to apply the standards of Rule 11 or Rule 83 or both. Mr. Hunnicutt also noted that it is unclear how expanding Rule 83 would interact with Rule 11's 21-day safe harbor in the family-law context where domestic commissioners may also be involved. Mr. Hunnicutt commented that the proposed amendment could be beneficial but recommended further discussing the intersection of Rule 83 and Rule 11 to possibly provide direction regarding when the standards of each rule should apply.

Leslie Slaugh commented that Rule 11 applies to both represented and unrepresented parties and that it is unclear why Rule 83 should not similarly apply to all parties. Mr. Hafen noted that although Rule 11 can be used to address baseless lawsuits, Rule 83's scope is narrower and requires higher standards to be met. Mr. Hafen agreed that excluding represented parties from Rule 83 only because they can afford representation is not well justified. The committee briefly discussed why represented parties may have been excluded from Rule 83.

Mr. Hafen asked for comments regarding the language of the proposed amendment to Rule 83. Trevor Lee commented that the use of the phrase "any court" in the proposed amendment may introduce issues of ambiguity similar to those that courts have identified in Rule 42. Additionally, Mr. Slaugh commented that the proposed amendment may not fully address the vexatious litigant issues raised by Senator Henderson's constituents because the rule's limited application to claims that are narrowly defined and, therefore, may not apply to other relevant contexts. Mr. Drechsel informed the committee that Senator Henderson had expressed an interest in seeing stronger and

more defined sanctions incorporated into Rule 83 but that domestic commissioners expressed concerns that doing so would chill the legitimate claims of parties that have fewer resources.

The committee discussed whether to shorten the 21-day safe harbor in Rule 11. Mr. Hafen commented that shortening the safe harbor could help shorten litigation but that any attempt to do so may face resistance from the bar. Ms. Sylvester suggested shortening the safe harbor only in family-law cases. Mr. Hunnicutt further suggested shortening the safe harbor only in family-law cases involving a domestic commissioner because the briefing schedule differs with commissioners.

Timothy Pack cautioned that motions for sanctions under Rule 11 are often emotional and that the 21 days act as a cooling period. Mr. Hafen commented that shortening the safe harbor may unintentionally increase motion practice rather than reduce it. Mr. Hunnicutt agreed that expanding methods for litigants to punish each other encourages increased motion practice and noted that the domestic system incentivizes mediation that disincentivizes vexatious litigants. Judge Laura Scott cautioned that judges must take care in family-law cases where options exist that are not typically available in other civil cases, including the power to adjust attorney fees based on a party's ability to pay and to award attorney fees based on individual claims. Susan Vogel noted that bad actors in family-law cases often find new attorneys to represent them when their previous attorneys withdraw, preventing Rule 83 from applying to parties who otherwise may qualify as vexatious litigants. Judge Kent Holmberg concurred with Judge Scott's comments and noted that there is some uncertainty regarding how changing Rule 11 could impact the awarding of attorney fees. The committee elected not to amend Rule 11 at this time.

Returning to the issue raised by Mr. Lee, the committee discussed the use and scope of the phrase "any court" in Rule 83, including how the phrase has been recently interpreted and whether the phrase includes federal courts or only state courts. After concluding discussion, the committee elected not to recommend altering the phrase at this time.

After the discussion concluded, Mr. Hafen called for a motion. Susan Vogel moved to send the proposed amendment to Rule 83 to the Supreme Court for comment. Timothy Pack seconded the motion. The motion passed unanimously.

The committee approved the following proposed amendments to send to the Court:

Rule 83. Vexatious litigants.

(a) Definitions.

(a)(1) The court may find a person to be a "vexatious litigant" if the person, with or without legal representation, including an attorney acting pro se[~~without legal representation~~], does any of the following:

. . . .

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

. . . .

(b)(5) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief in any court;

(e) Prefiling orders as to future claims.

(e)(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of the judicial district in which the claim is to be filed, in consultation with the judge who entered the vexatious litigant order, shall decide the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(j) Applicability of vexatious litigant order to other courts. After a court has issued a vexatious litigant order, any other court may rely upon that court's findings and order its own restrictions against the litigant as provided in paragraph (b).

(3) RULES 4, 7, 8, 36, 101

The committee reviewed the language of proposed amendments to Rules 4, 7, 8, 36, and 101, and made revisions to coordinate the proposed language regarding notice as follows:

Rule 4: (c)(1)(G) include the bilingual notice set forth in the form summons approved by the Utah Judicial Council.

Rule 7: (c)(2) **Caution language.** For all dispositive motions, the motion must include the following caution language at the top right corner of the first page, in bold type:
This motion requires you to respond. Please see the Notice to Responding Party.
(c)(3) **Bilingual notice.** All motions must include or attach the bilingual Notice to Responding Party approved by the Judicial Council.
(c)(4) **Failure to include caution language and notice.** Failure to include the caution language in paragraph (c)(2) and the bilingual notice in paragraph (c)(3) may be grounds to continue the hearing on the motion, or may provide the non-moving party with a basis under Rule 60(b) for excusable neglect to set aside the order resulting from the motion. Parties may opt out of receiving the notices set forth in paragraphs (c)(2 and (c)(3) while represented by counsel.

Rule 8: (a) **Claims for relief.** . . . A pleading requesting relief must include the following caution language at the top right of the first page, in bold print:
If you do not respond to this document within applicable time limits, judgment could be entered against you as requested.
Failure to include the caution language may provide the responding party with a basis under Rule 60(b) for excusable neglect to set aside any resulting judgment or order.

Rule 36: **(b) Required caution language on request for admission.**
(b)(1) All requests for admission must include the following caution language at the top right corner of the first page of the document, in bold type: **You must respond to these requests for admissions within 28 days or the court will consider you to have admitted these requests as true.**
(b)(2) Failure to include the caution language may provide the non-requesting party with a basis under Rule 60(b) for excusable neglect to set aside any resulting order or judgment.

Rule 101: (a)(2) All motions must provide the bilingual Notice to Responding Party approved by the Judicial Council.
(a)(3) Each motion to a court commissioner must include the following caution language at the top right corner of the first page, in bold type: **This motion will be decided by the court commissioner at an upcoming hearing. If you do not appear at the hearing, the Court might make a decision against you without your input. In addition, you may also file a written response at least 14 days before the hearing.**
(a)(4) Failure to provide the bilingual Notice to Responding Party or to include the caution language may provide the non-moving party with a basis under Rule 60(b) for excusable neglect to set aside any resulting order or judgment.

After the committee finalized the revisions, Mr. Hafen called for a motion. Jim Hunnicutt moved to send the proposed amendments to Rules 4, 7, 8, 36, and 101, as revised, to the Supreme Court for comment. Susan Vogel seconded the motion. The motion passed unanimously.

(4) RULE 24

The committee discussed the appropriateness of the term “agency” as used in proposed amendments to Rule 24. Ms. Sylvester informed the committee of Judge Holmberg’s comments regarding whether the term “agency,” “political subdivision,” or “governmental entity” would be most appropriate in the rule. Judge Holmberg and Ms. Sylvester recommended using “governmental entity,” which is used in other areas of the rule. The committee adopted the recommendation.

After discussion concluded, Mr. Hafen called for a motion. Paul Stancil moved to send the proposed amendment, as revised, to the Supreme Court. Susan Vogel seconded the motion. The motion passed unanimously.

The committee approved the following revised language to send to the Court in addition to other proposed amendments to Rule 24:

(b)(2) **By a Governmental Entity.** On timely motion, the court may permit a governmental entity, to intervene if a party’s claim or defense is based on:
(b)(2)(A) a statute or executive order administered by the governmental entity; or

(b)(2)(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(5) ADJOURNMENT

The remaining items were deferred until August 26, 2020. Before adjourning, the committee briefly discussed the need to review rules for potential changes related to the COVID-19 pandemic. The meeting adjourned at 5:49 p.m.